Reg Review: Studies on DOL Regs

TO: VEGAS-BOY
FROM: WONDER INTERN
DATE: DECEMBER 13, 1994

RE: WORK SAFETY AND LABOR REGULATIONS.

Wednesday, December 14, 1994 you will have a meeting concerning regulation review of work safety and labor issues. To better prepare yourself for that meeting, you requested copies of "Putting People First" and "Re-Inventing Government." Additionally, you requested a list of subjects/acts/regs that would possibly be appropriate for consideration.

Currently, two copies of "Putting People First" is being sent to you from the Publications Office. They will arrive no later than today. I will be picking up copies of the appropriate texts re: "Reinventing Government" today, at 3:30pm.

Attached, please find a list of subjects/acts/regs that may be of interest to you in this project. This is by no means complete, nor thoroughly researched. It is only a list created to demonstrate the breadth of the issue.

Attached, please also find a short description of several major employment regulations.

Popular Name Acts - Appropriate for your Consideration:

Age Discrimination in Employment Act
Anti-Injunction Act (Labor Disputes)
Barden-LaFollette Act (Vocational Rehabilitation)
Black-Connery Fair Labor Standards Act
Child Labor Act (Fair Labor Standards)
Clayton Act (Trusts)
Combination and Conspiracies Acts
Connery-Wagner Labor Relations Act
Cooper Labor Jurisdiction Amendment
Department of Labor Acts
Employment Service Act
Equal Pay Act
Fair Labor Standards Act & amendments to Act
Fess-Kenyon Act (Vocational Rehabilitation)
Fitzgerald Act (Apprentice Labor)
Griffin-Landrum Labor Reform Act
Hartley-Taft Act
Hour-Wage Act
Industrial Productivity and Labor Costs Act
Injunction Act (Labor Disputes)
Kennedy-Douglas Welfare and Pension Plans Disclosure Act
Kenyon-Fess Act (Vocational Rehabilitation
Labor Disputes Acts
Labor Injunction Act
Labor Management Relations Act
Labor-Management Reporting and Disclosure Act
Labor Standards Act
La Guardia-Norris Act (Anti-Injunction)
Maximum Hours Act (Labor)
Minimum Wage-Hour Act
National Apprentices Act
National Employment Service Act
National Labor Relations Act
Occupational Safety and Health Act of 1970
Peyser-Wagner Act (Federal Employment Service)
Picketing Act
Rehabilitation Act (Industrial Disabilities)
Restraint of Trade Acts (Trusts)
Right to Work Law
Taft-Hartley Act (Labor)
United States Employment Service Act
Virgin Islands Wage Orders Act
Vocational Rehabilitation Act and amendments to Act
Wagner Act (Labor Disputes)
Welfare and Pension Plans Disclosure Act and amendments to Act
Women's Bureau Act (Department of Labor)
Yellow Dog Contracts Act

Subject Matter (Big-Ticket-Items) that you should look at:

Trade Unions
Vocational Rehabilitation of persons injured in Industry
Employment Stabilization
Federal Employment Service
Apprentice Labor
Labor Disputes; Mediation and Injunctive Relief
Jurisdiction of Courts in Matters Affecting Employer and Employee
Labor-Management Relations
Fair Labor Standards
Disclosure of Welfare and Pension Plans
Labor-Management Reporting and Disclosure Procedure
Department of Labor
Age Discrimination in Employment
Occupational Safety and Health
Davis-Bacon Act
ERISA
Job Training and Placement Programs
Unemployment Compensation
Americans with Disabilities Act

EQUAL PAY ACT
29 USCA 206

GENERALLY, WHAT IS IT?

The Equal Pay Act of 1963 (hereinafter referred to as "the Act"), an amendment to the Fair Labor Standard Act, ensures equal pay for men and women for equal work. CCH, "Age and Sex Discrimination (Health Benefits), page 8, 716, paragraph 28,100.

Exceptions to the Act (i.e. differentials in pay) are allowable if justified as a result of seniority, quality and productivity or work, merit performance, unequal working conditions, and similar factors other than those based upon sex. id.

Originally, the Act was exempted from work done by executive, administrative and professional personnel; in 1972 however, this exemption was removed with the passage of PL 93-318. Brady and Perssons, "Equal Pay Acts," Employee Compensation in Michigan, Vol. 1, IV-39. In 1974, further amendments made to the Equal Pay Act ensured that employees within state and local government (with the exception of elected persons and individuals involved in policy making) would also be protected by the Act. id.

The Act is enforced through the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC"). The EEOC enforces the Act by making investigations and, in the event of suspected failure to abide by the Act, the EEOC may bring suit. id. at IV-40.

IS THE EQUAL PAY ACT DIFFERENT FROM THE CIVIL RIGHTS ACT?

Both the Civil Rights Act and the Equal Pay Act are similar in many respects, yet are defined differently (i.e. Sex is an issue examined by both areas of the law, however, sex discrimination is fought by the Civil Rights Act and equal pay is fought for by the Equal Pay Act). Note also, that employers found liable under the Equal Pay Act are not necessarily liable under the Civil Rights Act (and vice versa). Fallon v. State of Illinois, C.A. 7 (Ill.) 1989, 882 F.2d 1206, 1213. The Court stated; "...In sum, the Equal Pay Act and Title VII, although similar, are nonetheless distinct. They remain separate as to the proof required and as to the allocation of the parties' burden of proof. We thus will follow the lead of those courts holding that a finding of Equal Pay Act liability, without more, will not lead automatically to liability under Title VII." id. at 1218.

FAIR LABOR STANDARDS ACT
29 USCA 201

GENERALLY, WHAT IS IT?

The best and simplest summary of the Fair Labor Standards Act (hereinafter referred to as the FLSA) can be found in Marshall v. Sideris, 524 F. Supp. 521, 523 (D.C. Neb. 1981): "The FLSA was passed to provide a minimal standard of living necessary for the health, efficiency, and general well-being and to prescribe certain minimum standards for working conditions."

The Fair Labor Standards Act is also known as the Federal Wage and Hour Law. Brady and Persson, "Fair Labor Standards Act (Wage and Hour)," Employee Compensation in Michigan, Vol. 1, IV-51, 2191. This comes as no surprise, because as the Court stated in Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590;64 S.Ct. 698; 88 L.Ed. 949, by the enactment of the Federal Labor Standards Act. "...Congress intended...to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." cited by Lerwill v. Inflight Motion Pictures, Inc., 577 F.2d 444 (C.A. Cal. 1978).

The Fair Labor Standards Act provides that a minimum wage and overtime is provided for "all employees engaged in interstate or foreign commerce, and...all employees (including nonprofit organizations) grossing $500,000 or more per year, effective April 1, 1990 and with two or more employees involved in interstate commerce." Brady and Persson, "Fair Labor Standards Act (Wage and Hour)" Employee Compensation in Michigan, Vol. 1, IV-5, 2/91.

EMPLOYEE POLYGRAPH PROTECTION ACT
29 USCA 2001

GENERALLY, WHAT IS IT?

The Employee Polygraph Protection Act is relatively a new Act, as it was enacted in 1988. Basically, the Act states that employers may not force employees or prospective employees to take polygraph tests. 29 USCA 2001. Only a few exemptions exist:

The Employee Polygraph Protection Act does not apply to governmental employers, National Defense and Security, Federal Bureau of Investigations Contractors, Security Services, Drug Security, Drug Theft, or Drug Diversion Investigations. A limited exemption exists for ongoing investigations. 29 USCA 2006.

AGE DISCRIMINATION IN EMPLOYMENT ACT
29 USCA 623
29 USCA 631

Please note, both the Age Discrimination in Employment Act and Age Discrimination will be discussed together, below.

GENERALLY, WHAT IS IT?

Basically, the terms of the Age Discrimination in Employment Act of 1967 (hereinafter referred to as "ADEA" or "the Act") forbid employers to discharge, not hire, or otherwise discriminate against an individual (this includes compensation, conditions, terms, or privileges of employment) because the individual is forty years or older. CCH, Age and Sex Discrimination (Health Benefits). "Age Discrimination", page 8,712, paragraph 28,010; 1992; CCH Disability-Worker's Compensation-Life Insurance, "Age Discrimination" page 10,712, paragraph 36, 010; 1990. This Act is an example of an age discrimination law.

While most age discrimination laws concentrate on aspects of employee retirement, hiring, or firing; they may also be applicable to employee benefits (ADEA is such an example). CCH, Age and Sex Discrimination (Health Benefits), "Age Discrimination", page 8,712, paragraph 28,010; 1992. The ADEA requires employers to provide the same treatment in coverage under a group health plan to all employees, regardless of age. id., at page 8,713.

HISTORY:

The ADEA prohibits employment practices that discriminate against employees or employment applicants who are forty to sixty five years of age. CCH, Age and Sex Discrimination in Health Benefits, "Age Discrimination in Employment Act", page 8,716, paragraph 28, 024; 1992. In 1978, amendments raised the protected age to seventy and invalidated involuntary retirement provisions (of employees within the protected age group) in pension and retirement plans. id. Finally, the 1986 amendments to the ADEA (P.L. 99-595) invalidated most involuntary mandatory retirement plans, even after age seventy. id. The ADEA was further extended to all employee benefit plans with the passage of the Older Workers Benefit Protection Act of 1990 (P.L. 101-433). id. at page 8,717.

Note: Under the Older Workers Benefit Protection Act, voluntary retirement incentive plans are allowable if they "do not arbitrarily discriminate on the basis of age." id. at 8,717. Examples of early retirement incentive plans which qualify, are those which:

1. provides the attainment of a minimum age as a condition for normal or early retirement benefits;

2. subsidizes provision of an early retirement benefit; or
3. supplements Social Security before the participant reaches the eligibility age to be entitled to benefits." id. at 8,717 to 8,717-2.

WHEN DOES ADEA APPLY?

ADEA applies to employers engaged in "industry affecting commerce", employing twenty or more employees during the year. 29 USCA 630(b); CCH, Age and Sex Discrimination in Health Benefits, "Age Discrimination in Employment Act", page 8,716, paragraph 28,024; 1992; CCH, Disability-Worker's Compensation-Life Insurance, "Age Discrimination", page 10,712, paragraph 36,010; 1990. The employees do not need to be on the payroll for the entire year--requirements merely state that the employer must employ at least twenty employees every day of the week for twenty calendar weeks. id. Once coverage is established, ADEA coverage protection continues through the following year, even if fewer than twenty employees remain on the payroll. id.

UNEMPLOYMENT COMPENSATION
29 USCA 49

GENERALLY, WHAT IS IT?

Unemployment Compensation, is just that. It is merely short term compensation given to certain individuals who are unemployed. This service is administered by both the Federal and state governments. The Federal government has set up an unemployment framework through the Federal Unemployment Tax and Social Security Act. Brady and Persson, "Unemployment Compensation," Employee Compensation in Michigan, Vol. 1, IV-153, 1991. These laws set forth the rules that the states must follow in determining their own tax structures, qualification standards, benefit levels, and procedures for disqualification. id. Through a system of tax-sharing, Federal tax credits, and use of "experience ratings", most employers fund the needed amount for unemployment compensation. id.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
PL93-406

GENERALLY, WHAT IS IT?

The Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") sounds like a retirement plan, but it is much more. "Title I of ERISA applies to (1) an employee benefit plan, (2) established or maintained by an employer, (3) engaged in commerce or in an industry or activity affecting commerce." Canan and Mitchell, Employee Fringe and Welfare Benefit Plans, 2, 1990; 29 USCA 1003(a). It provides rules on some welfare plans (all health card, prepaid legal services, life and disability insurance), stock bonuses, profit-sharing, and pension plans. Brady and Persson, "ERISA," Employee Compensation in Michigan, Vol. 1, IV-43, IV-44, 2/87; Canan and Mitchell, Employee Fringe and Welfare Benefit Plans, 2, 1990. Note also, that "...[c]ertain plans that would otherwise be included in this definition are specifically excluded by statute. Those plans are (1) governmental plans (2) church plans, (3) plans maintained solely for the purpose of complying with applicable workmen's compensation laws or disability insurance laws, (4) plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens, and (5) excess benefit plans." Canan and Mitchell, Employee Fringe and Welfare Benefit Plans, 2, 1990.

DAVIS-BACON ACT
40 USCA 276a - 276a-5

GENERALLY, WHAT IS IT?

The Davis-Bacon Act is applicable to government contracts over $2,000.00 which have, as their purpose to construct, repair, or alter public buildings or works of the United States. Brady and Persson, "Service Contract Act--Davis Bacon Act," Employee Compensation in Michigan, Vol. 1, IV-127, Rev. 6/86. Basically, this Act provides that the rate of wages and fringe benefits for laborer and mechanics doing similar work in the same geographical location of the state. id. It also states that overtime
location of the state. id. It also states that overtime pay is time and one-half for hours in excess of forty per week. id. This serves as a protection for local contractors from being underbid. Building and Construction Trade Dept. AFL-CIO v. U.S. Dept. of Labor Wage Appeals Bd., C.A.D.C. 1991, 932 F.2d 985.

CIVIL RIGHTS ACT OF 1964.
42 USCA 2000e-2(b)

GENERALLY, WHAT IS IT?

Basically, the Civil Rights Act of 1964 prohibits discrimination against individuals on the basis of race, national origin, color, and religion.

LABOR MANAGEMENT RELATIONS
29 USCA 186

GENERALLY, WHAT IS IT?

Briefly, the Labor-Management Relations Act discourages extortion, bribery, kickbacks, etc.; fosters the collective bargaining process of employees, fosters loyalty of union officials and works to protect union funds. 29 USCA 186. This is a law of general applicability.

NATIONAL LABOR RELATIONS ACT
29 USCA 151

GENERALLY, WHAT IS IT?

Basically, the National Labor Relations Act protects the rights of laborers to organize without fear of retribution from their employers or from unions. This is a law of general applicability.

OCCUPATIONAL SAFETY AND HEALTH
29 USCA 651

GENERALLY, WHAT IS IT?

The purpose of the Occupational Safety and Health Act (hereinafter referred to as "OSHA" or "the Act") is to improve employment safety. The Act is enforced through on-site inspections by Federal agents. To gain an idea of the breadth of issues within this Act, please see attachments.

ON

OBSTRUCTION—Cont'd

OBSTRUCTIONS IN NAVIGABLE WATERS

OBSTRUCTIONS IN NAVIGABLE WATERS —Cont'd

OCALA NATIONAL FOREST

OCCUPANT RESTRAINT SYSTEM

OCCUPATIONAL DISEASES

OCCUPATIONAL SAFETY AND HEALTH

GAO

United States
General Accounting Office
Washington, D.C. 20548

Health, Education, and
Human Services Division

B-254248

June 30, 1994

The Honorable William D. Ford
Chairman, Committee on
Education and Labor
House of Representatives

The Honorable William F. Goodling
Ranking Minority Member
Committee on Education and Labor
House of Representatives

The Honorable Pat Williams
Chairman, Subcommittee on
Labor-Management Relations
Committee on Education and Labor
House of Representatives

The Honorable Marge Roukema
Ranking Minority Member
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In response to your request, this report describes the major statutes and executive order comprising the framework of federal workplace regulation, and provides information on employer and union experiences operating under that framework.

We are sending copies of the report to the Secretary of Labor and other interested parties. Copies also will be made available to others on request.

This report was prepared under the direction of Linda G. Morra, Director, Education and Employment Issues, who may be reached on (202) 512-7014 if you or your staff have any questions. Other major contributors are listed in appendix III.

Janet L. Shikles

Janet L. Shikles
Assistant Comptroller General

Executive Summary

Purpose

Like many industrialized nations, the United States employs several different strategies for protecting workers. One strategy for setting workplace standards is through the enactment of statutes that directly set the terms and conditions of employment and relies on agencies and the courts for enforcement.

Another strategy is to encourage the direct resolution of workplace problems by the parties themselves, rather than through judicial or regulatory recourse. The appropriate use of both of these strategies can contribute to increased worker productivity while reducing workplace conflict.

With the Secretaries of Labor's and Commerce's Commission on the Future of Worker-Management Relations examining these and other issues, the Chairmen and Ranking Minority Members of the House Education and Labor Committee and its Subcommittee on Labor-Management Relations requested that GAO study issues related to the framework of federal workplace regulation. Specifically, they asked GAO to (1) identify and analyze the characteristics of the major statutes comprising the framework and (2) describe the actual experiences of a wide range of employer and employee representatives with workplace regulation.

To address these issues, GAO

- surveyed the literature and consulted with experts to identify and analyze the major statutes and executive orders on workplace regulation, and
- interviewed a broad range of 36 employers and union and employee committee representatives of organizations of varying sizes and industries and in different states to determine their actual experiences operating under these statutes.

The requesters realized that those interviewed will not be representative of all employers and unions, but nevertheless believe that the results will be useful.

Background

Many federal statutes governing the workplace, for example the Occupational Safety and Health Act (OSHA), fall under a "command and control" model; that is, the statute or regulation is the command, and government enforcement efforts such as inspections or filing suit in the courts are the control. Other statutes, such as the National Labor Relations

Act (NLRA), are more process oriented, specifying the context within which employers, workers, and unions may negotiate different concerns.

The effectiveness of command and control regulation is influenced by many factors, including the available level of regulatory resources, the sanctions for noncompliance, and the ease of employer compliance. In some instances, command and control regulation can be enhanced by increasing the involvement of employers and workers in aspects of the regulatory process. For example, GAO has identified strengthened roles for employers and workers as one of several main options to improve workplace health and safety.[1]

The executive branch of the federal government is currently considering alternative strategies for regulating the workplace. In March 1993, the President asked the Secretaries of Labor and Commerce to form a Commission on the Future of Worker-Management Relations to address issues such as the extent to which the present legal framework and practices of collective bargaining could change to improve productivity and reduce conflict. Recognizing the need to make government work better and cost less, the administration has also initiated the National Performance Review (NPR) under the direction of the Vice President. A key component of the NPR is an enhanced emphasis on customer service. Consistent with this goal, the administration issued Executive Order 12862, which requires all federal agencies and departments to become more customer driven and provide services equal to the "best in business."

Results in Brief

The magnitude, complexity, and dynamics of workplace regulation pose a challenge for employers of all sizes. Such regulation has expanded and continually changed during the last 60 years, not only with the passage of new laws but also with the consequences of judicial decisions and the promulgation of new and revised regulations. For example, although only 7 of the 26 key statutes and one executive order on workplace regulation—primarily covering areas like labor-management relations, minimum wages, and unemployment insurance—were in place by 1940 and 8 by 1960—they doubled by 1970 and reached 19 by 1980. These complex workplace regulations, however, are but one part of broader regulatory duties, such as environmental and tax requirements, with which employers must comply.

[1]See Occupational Safety & Health: Options for Improving Safety and Health in the Workplace (GAO/HRD-90-66BR, Aug. 24, 1990).

The wide variety of 36 employers and union representatives that GAO interviewed generally supported the need for workplace regulations. They frequently voiced concerns, however, with the operation of the overall regulatory process of many agencies and about whether the agencies' regulatory goals were being achieved. For example, while most of the employers said that they could comply with workplace-related paperwork requirements without undue burden, many said that certain paperwork requirements had questionable value in meeting the law's objectives. Many of the employers GAO interviewed believe that the current regulatory approach used by many agencies is largely adversarial, characterized by poor communication, unfair and inconsistent enforcement, and vague laws and regulations that increase the potential for lawsuits. Most unions GAO talked to agreed with this assessment, although they also believed that many agencies were often not vigorous enough in enforcing existing regulatory protections.

The employer and union representatives that GAO interviewed generally called for changing agencies' approaches toward regulation. They urged agencies to develop a more service-oriented approach to workplace regulation: improving information access and educational assistance to employers, workers, and unions, and permitting more input into agency standard setting and enforcement efforts. Many of the employers—both large and small—remarked that they were rarely confident that they knew all the laws and regulations for compliance and often could not get accurate information on the applicable statutes or on how to comply. They suggested making accurate information about employer and employee rights and compliance responsibilities more accessible. Employers that GAO interviewed generally also urged that agencies abandon what they saw as a "gotcha" approach to enforcement and recognize good faith compliance efforts. Overall, they advised that agencies collaborate more closely with them during the regulatory process. Unions suggested that their role be expanded during agencies' enforcement procedures such as greater participation in Fair Labor Standards Act backwage settlements.

Principal Findings

Federal Workplace Regulation Is Complex and Constantly Changing

Employers face an extensive network of workplace requirements that specify a wide variety of employee protections. Congress has amended laws resulting in new workplace requirements. Numerous implementing regulations—the actual rules that affect employers in their employment relations—are constantly changing. In addition, some federal agencies issue administrative decisions that may modify workplace requirements. For example, the National Labor Relations Board (NLRB), an independent agency that enforces the NLRA, derives most regulatory requirements from administrative case law. The amount of federal workplace regulation facing a particular employer varies, however, depending on the employer's number of employees and industry and whether it is a federal contractor. Of the 26 statutes and one executive order, 16 apply to employers across all industries, with the remainder applying only to employers who are federal contractors or only operating in particular industries.

Yet most of the employers GAO interviewed said that federal workplace regulation was an important concern but often not the most important regulatory area they faced. They often indicated that state, nonworkplace, or industry-specific regulations equaled or overshadowed federal workplace regulation. Smaller employers often mentioned a primary concern with nonfederal regulations, such as state licensing laws or workers' compensation programs. Larger employers were somewhat more likely to focus on federal workplace regulation but also mentioned a concern with environmental, tax, and other regulatory areas. As an official from a large auto manufacturer explained:

"In terms of compliance burdens, workplace regulation is not as significant as other issues: taxes, trade, and environmental issues loom far larger."

Employers Report a Variety of Compliance Strategies

Employers that GAO talked to typically had different compliance strategies, depending on their size. Smaller employers that GAO interviewed more generally relied on outside legal staff, contracted out their health, pension, and other benefits administration, and often relied on contractors for payroll processing. Larger employers reported that they generally maintained in-house human resource departments, health and safety units, and legal staffs to comply with many workplace requirements. However, some pension benefit requirements were considered so complex that even many larger companies contracted out for some compliance duties. An official from a large hotel management company asserted:

"The only thing ERISA [the Employee Retirement Income Security Act of 1974] has done is to enrich consulting companies. They [the regulations] are so confusing that [consulting] companies must be hired to ensure compliance."

Employers Expressed Uncertainty About Their Level of Regulatory Compliance

Although smaller employers that GAO interviewed appeared to be the least aware of workplace requirements, even larger employers felt unsure of all the rules that applied to their operations. An official from a hospital complained:

"The sheer volume and nitty-gritty of regulations make compliance difficult."

This lack of confidence and awareness has contributed to a widespread employer fear of noncompliance among the employers we interviewed. As an official from a small software company explained:

"We always use common sense but because of our lack of knowledge we are never sure of our compliance."

Some employers expressed a concern that statutes and regulations had vaguely stated or ambiguous requirements which they believed increased the potential for lawsuits. Several employers, for instance, thought that various definitions under the Americans with Disabilities Act (ADA) were ambiguous, leaving them confused about their responsibilities. For example, officials of a large electronics manufacturer said:

"We have concerns about the definition of mental disability under the ADA...We don't know how the courts will interpret this concept and believe that it may create future legal problems and litigation."

Union representatives that GAO talked to also discussed the difficulty of getting accurate information from some government agencies. They believed that this contributed to many workers' lack of awareness of their workplace rights. For example, officials of a local union representing health care workers described problems getting accurate information from the local Wage and Hour Division office:

"When we contacted the local office we got confusing information, and different and contradictory answers on subsequent phone calls. This happened in the middle of an organizing effort and the union's credibility was questioned because of the information we had gotten from DOL [the Department of Labor]."

Employers and Unions Report Concern With Implementation of Workplace Laws

GAO found that employer and union representatives interviewed generally supported the legislative goals of federal workplace regulation. For example, most employers supported OSHA's goal of ensuring each employee a safe and healthful workplace. Many had serious concerns, however, with how some agencies carried out their regulatory missions. For example, employers that GAO interviewed thought that some agencies enforced regulations inconsistently across regions and that some agencies had a petty attitude toward regulatory enforcement, focusing on minor infractions, and failed to consider good faith compliance efforts. For example, an official at a large paper manufacturer with facilities in several states said:

"The interpretation of standards by [federal OSHA] inspectors will vary from region to region; some are stricter than others. Inspectors can interpret the standards differently from state to state. We have been cited for a violation in one state that was acceptable in another state."

In addition, officials from the company stated that some agencies lacked the resources to process complaints in a timely and effective manner and had ill-trained staff.

Most union representatives that GAO spoke to agreed with this assessment, although they also believed that many agencies were not vigorous enough in enforcing regulatory protections. For example, officials of an international union believed:

"Enforcement of FLSA [Fair Labor Standards Act] by the Wage and Hour Division is a low priority at DOL. DOL needs to be more aggressive with respect to enforcing FLSA."

Employers and Unions Suggest More Service-Oriented Approach by Agencies

Most employers and union representatives urged agencies to adopt a more service-oriented approach to regulation. They viewed such an approach as fostering a more collaborative relationship between employers, unions, and workers that could ultimately ease compliance and help to achieve legislative goals. Proposed elements include

- making information more accessible to employers, workers, and unions;
- providing more technical and education assistance to employers, workers, and unions; and
- permitting more input from employers and unions into agencies' standard-setting and enforcement procedures.

Some employers and unions that GAO spoke to also identified various forms of alternative dispute resolution, including arbitration and mediation, as potentially useful vehicles to reduce workplace conflict. Employers and union representatives that GAO interviewed suggested ways to improve service orientation, including the use of toll-free information hotlines and the expanded use of new information technologies. For example, an official from a small software company suggested:

"What is needed from the federal government is a fool's guide to regulation."

Recommendations

GAO is making no recommendations.

Agency Comments

Labor reiterated GAO's caution that the findings from the small number of interviews conducted are not generalizable to either the employer or employee representative communities as a whole. Thus, care should be exercised in drawing conclusions from them. Nevertheless, Labor took these interview comments very seriously and found the essential substance of the report to be entirely consistent with Labor's recent initiatives to enhance its operations.

GAO emphasizes that its findings are based on a small number of cases. However, while not generalizable, GAO believes that the detailed, qualitative information collected provides important insights into employers' and unions' experiences concerning federal workplace regulation. The case studies include a widely varied group: large, medium, and small size employers from over 20 different industries and 16 states; local and international unions; and nonunion labor-management workplace committees. Labor points out that many of GAO's findings are consistent with initiatives Labor has underway and some previous GAO studies.[2] Additionally, GAO's findings resonate with the experiences of many members of the labor-management advisory committee that assisted the study.

Labor also had numerous technical comments as did NLRB and the Equal Employment Opportunity Commission who reviewed relevant sections of the report. The comments were incorporated where appropriate.

[2]See Occupational Safety & Health: OSHA Action Needed to Improve Compliance With Hazard Communication Standard (GAO/HRD-92-8, Nov. 26, 1991), and Occupational Safety & Health: Employers' Experiences in Complying With the Hazard Communication Standard (GAO/HRD-92-63BR, May 8, 1992).

GAO

United States
General Accounting Office
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The executive branch of the federal government is currently considering alternative strategies for regulating the workplace. In March 1993, the President asked the Secretaries of Labor and Commerce to form a Commission on the Future of Worker-Management Relations to address issues such as the extent to which the present legal framework and practices of collective bargaining could change to improve productivity and reduce conflict. Recognizing the need to make government work better and cost less, the administration has also initiated the National Performance Review (NPR) under the direction of the Vice President. A key component of the NPR is an enhanced emphasis on customer service. Consistent with this goal, the administration issued Executive Order 12862, which requires all federal agencies and departments to become more customer driven and provide services equal to the "best in business."

Results in Brief

The magnitude, complexity, and dynamics of workplace regulation pose a challenge for employers of all sizes. Such regulation has expanded and continually changed during the last 60 years, not only with the passage of new laws but also with the consequences of judicial decisions and the promulgation of new and revised regulations. For example, although only 7 of the 26 key statutes and one executive order on workplace regulation—primarily covering areas like labor-management relations, minimum wages, and unemployment insurance—were in place by 1940 and 8 by 1960—they doubled by 1970 and reached 19 by 1980. These complex workplace regulations, however, are but one part of broader regulatory duties, such as environmental and tax requirements, with which employers must comply.

[1]See Occupational Safety & Health: Options for Improving Safety and Health in the Workplace (GAO/HRD-90-66BR, Aug. 24, 1990).

The wide variety of 36 employers and union representatives that GAO interviewed generally supported the need for workplace regulations. They frequently voiced concerns, however, with the operation of the overall regulatory process of many agencies and about whether the agencies' regulatory goals were being achieved. For example, while most of the employers said that they could comply with workplace-related paperwork requirements without undue burden, many said that certain paperwork requirements had questionable value in meeting the law's objectives. Many of the employers GAO interviewed believe that the current regulatory approach used by many agencies is largely adversarial, characterized by poor communication, unfair and inconsistent enforcement, and vague laws and regulations that increase the potential for lawsuits. Most unions GAO talked to agreed with this assessment, although they also believed that many agencies were often not vigorous enough in enforcing existing regulatory protections.

The employer and union representatives that GAO interviewed generally called for changing agencies' approaches toward regulation. They urged agencies to develop a more service-oriented approach to workplace regulation: improving information access and educational assistance to employers, workers, and unions, and permitting more input into agency standard setting and enforcement efforts. Many of the employers—both large and small—remarked that they were rarely confident that they knew all the laws and regulations for compliance and often could not get accurate information on the applicable statutes or on how to comply. They suggested making accurate information about employer and employee rights and compliance responsibilities more accessible. Employers that GAO interviewed generally also urged that agencies abandon what they saw as a "gotcha" approach to enforcement and recognize good faith compliance efforts. Overall, they advised that agencies collaborate more closely with them during the regulatory process. Unions suggested that their role be expanded during agencies' enforcement procedures such as greater participation in Fair Labor Standards Act backwage settlements.

Principal Findings

Federal Workplace Regulation Is Complex and Constantly Changing

Employers face an extensive network of workplace requirements that specify a wide variety of employee protections. Congress has amended laws resulting in new workplace requirements. Numerous implementing regulations—the actual rules that affect employers in their employment relations—are constantly changing. In addition, some federal agencies issue administrative decisions that may modify workplace requirements. For example, the National Labor Relations Board (NLRB), an independent agency that enforces the NLRA, derives most regulatory requirements from administrative case law. The amount of federal workplace regulation facing a particular employer varies, however, depending on the employer's number of employees and industry and whether it is a federal contractor. Of the 26 statutes and one executive order, 16 apply to employers across all industries, with the remainder applying only to employers who are federal contractors or only operating in particular industries.

Yet most of the employers GAO interviewed said that federal workplace regulation was an important concern but often not the most important regulatory area they faced. They often indicated that state, nonworkplace, or industry-specific regulations equaled or overshadowed federal workplace regulation. Smaller employers often mentioned a primary concern with nonfederal regulations, such as state licensing laws or workers' compensation programs. Larger employers were somewhat more likely to focus on federal workplace regulation but also mentioned a concern with environmental, tax, and other regulatory areas. As an official from a large auto manufacturer explained:

"In terms of compliance burdens, workplace regulation is not as significant as other issues: taxes, trade, and environmental issues loom far larger."

Employers Report a Variety of Compliance Strategies

Employers that GAO talked to typically had different compliance strategies, depending on their size. Smaller employers that GAO interviewed more generally relied on outside legal staff, contracted out their health, pension, and other benefits administration, and often relied on contractors for payroll processing. Larger employers reported that they generally maintained in-house human resource departments, health and safety units, and legal staffs to comply with many workplace requirements. However, some pension benefit requirements were considered so complex that even many larger companies contracted out for some compliance duties. An official from a large hotel management company asserted:

"The only thing ERISA [the Employee Retirement Income Security Act of 1974] has done is to enrich consulting companies. They [the regulations] are so confusing that [consulting] companies must be hired to ensure compliance."

Employers Expressed Uncertainty About Their Level of Regulatory Compliance

Although smaller employers that GAO interviewed appeared to be the least aware of workplace requirements, even larger employers felt unsure of all the rules that applied to their operations. An official from a hospital complained:

"The sheer volume and nitty-gritty of regulations make compliance difficult."

This lack of confidence and awareness has contributed to a widespread employer fear of noncompliance among the employers we interviewed. As an official from a small software company explained:

"We always use common sense but because of our lack of knowledge we are never sure of our compliance."

Some employers expressed a concern that statutes and regulations had vaguely stated or ambiguous requirements which they believed increased the potential for lawsuits. Several employers, for instance, thought that various definitions under the Americans with Disabilities Act (ADA) were ambiguous, leaving them confused about their responsibilities. For example, officials of a large electronics manufacturer said:

"We have concerns about the definition of mental disability under the ADA...We don't know how the courts will interpret this concept and believe that it may create future legal problems and litigation."

Union representatives that GAO talked to also discussed the difficulty of getting accurate information from some government agencies. They believed that this contributed to many workers' lack of awareness of their workplace rights. For example, officials of a local union representing health care workers described problems getting accurate information from the local Wage and Hour Division office:

"When we contacted the local office we got confusing information, and different and contradictory answers on subsequent phone calls. This happened in the middle of an organizing effort and the union's credibility was questioned because of the information we had gotten from DOL [the Department of Labor]."

Employers and Unions Report Concern With Implementation of Workplace Laws

GAO found that employer and union representatives interviewed generally supported the legislative goals of federal workplace regulation. For example, most employers supported OSHA's goal of ensuring each employee a safe and healthful workplace. Many had serious concerns, however, with how some agencies carried out their regulatory missions. For example, employers that GAO interviewed thought that some agencies enforced regulations inconsistently across regions and that some agencies had a petty attitude toward regulatory enforcement, focusing on minor infractions, and failed to consider good faith compliance efforts. For example, an official at a large paper manufacturer with facilities in several states said:

"The interpretation of standards by [federal OSHA] inspectors will vary from region to region; some are stricter than others. Inspectors can interpret the standards differently from state to state. We have been cited for a violation in one state that was acceptable in another state."

In addition, officials from the company stated that some agencies lacked the resources to process complaints in a timely and effective manner and had ill-trained staff.

Most union representatives that GAO spoke to agreed with this assessment, although they also believed that many agencies were not vigorous enough in enforcing regulatory protections. For example, officials of an international union believed:

"Enforcement of FLSA [Fair Labor Standards Act] by the Wage and Hour Division is a low priority at DOL. DOL needs to be more aggressive with respect to enforcing FLSA."

Employers and Unions Suggest More Service-Oriented Approach by Agencies

Most employers and union representatives urged agencies to adopt a more service-oriented approach to regulation. They viewed such an approach as fostering a more collaborative relationship between employers, unions, and workers that could ultimately ease compliance and help to achieve legislative goals. Proposed elements include

- making information more accessible to employers, workers, and unions;
- providing more technical and education assistance to employers, workers, and unions; and
- permitting more input from employers and unions into agencies' standard-setting and enforcement procedures.

Some employers and unions that GAO spoke to also identified various forms of alternative dispute resolution, including arbitration and mediation, as potentially useful vehicles to reduce workplace conflict. Employers and union representatives that GAO interviewed suggested ways to improve service orientation, including the use of toll-free information hotlines and the expanded use of new information technologies. For example, an official from a small software company suggested:

"What is needed from the federal government is a fool's guide to regulation."

Recommendations

GAO is making no recommendations.

Agency Comments

Labor reiterated GAO's caution that the findings from the small number of interviews conducted are not generalizable to either the employer or employee representative communities as a whole. Thus, care should be exercised in drawing conclusions from them. Nevertheless, Labor took these interview comments very seriously and found the essential substance of the report to be entirely consistent with Labor's recent initiatives to enhance its operations.

GAO emphasizes that its findings are based on a small number of cases. However, while not generalizable, GAO believes that the detailed, qualitative information collected provides important insights into employers' and unions' experiences concerning federal workplace regulation. The case studies include a widely varied group: large, medium, and small size employers from over 20 different industries and 16 states; local and international unions; and nonunion labor-management workplace committees. Labor points out that many of GAO's findings are consistent with initiatives Labor has underway and some previous GAO studies.[2] Additionally, GAO's findings resonate with the experiences of many members of the labor-management advisory committee that assisted the study.

Labor also had numerous technical comments as did NLRB and the Equal Employment Opportunity Commission who reviewed relevant sections of the report. The comments were incorporated where appropriate.

[2]See Occupational Safety & Health: OSHA Action Needed to Improve Compliance With Hazard Communication Standard (GAO/HRD-92-8, Nov. 26, 1991), and Occupational Safety & Health: Employers' Experiences in Complying With the Hazard Communication Standard (GAO/HRD-92-63BR, May 8, 1992).

Employers Face an Extensive Network of Workplace Regulation

"The requirements are like an octopus: the regulations are extremely complex and the company needs outside expertise to remain in compliance."—An official from a large retail company describing Employment Retirement Income Security Act and COBRA

"Knowing about all the changes that occur in the laws is also difficult....No one really has the time to read comprehensively the laws and changes to them."—An official from a medium-size textile manufacturer

"Although workplace regulations are serious, time-consuming and expensive, in the scheme of things, federal workplace regulation is not the worst thing."—An official from a large hospital

Federal workplace regulation has greatly expanded over the last 60 years, generally imposing new obligations on employers in order to protect workers. The continued growth and frequency of regulation leaves today's employers facing an extensive network of workplace rules. Workplace regulation undergoes frequent change from many sources, including actions by the Congress, the relevant agencies and review commissions, and the courts. The number of federal workplace-related requirements that affect a particular employer varies primarily by the employer's number of employees, its industry, and whether it enters into federal contracts. However, the employers we interviewed said that, in general, while workplace regulation was an important concern to their companies, nonlabor-related regulation equaled or overshadowed workplace regulation.

Federal Workplace Regulation Has Grown to Cover a Wide Variety of Workplace Activities

Relying largely on its constitutional authority to regulate interstate commerce, the Congress has passed many laws regulating the workplace of employers engaged in, or whose business activities affect interstate commerce. These laws, which change to meet the ever-expanding and increasingly complicated conditions of commerce, cover a wide variety of activities ranging from labor-management relations to pensions, family leave, and the setting of prevailing and minimum wages. (See table 2.1.)

In addition to workplace regulation imposed by the enactment of statutes or the issuance of executive orders, employers and workers face obligations and protections established by regulation and case law. Federal agencies issue regulations clarifying and expanding upon the laws, and courts make decisions interpreting the laws. Most federal workplace regulatory requirements are enforced by agencies within the Department of Labor (Labor), but the Equal Employment Opportunity Commission

(EEOC) and the National Labor Relations Board (NLRB) also enforce workplace regulations.

Table 2.1: Description of Major Statutes and Executive Orders Governing Workplace Regulation[a]

Statute	Description	Principal enforcement agency
Labor Standards		
FLSA	Establishes minimum wage, overtime pay and child labor standards	Labor - WHD[b]
Davis-Bacon Act	Provides for payment of prevailing local wages and fringe benefits to laborers and mechanics employed by contractors and subcontractors on federal contracts for construction, alteration, repair, painting or decorating of public buildings or public works	Labor - WHD
Service Contract Act	Provides for payment of prevailing local wages and fringe benefits and safety and health standards for employees of contractors and subcontractors providing services under federal contracts	Labor - WHD
Walsh-Healey Act	Provides for labor standards, including wage and hour, for employees working on federal contracts for the manufacturing or furnishing of materials, supplies, articles or equipment	Labor - WHD
CWHSSA	Establishes standards for hours, overtime compensation, and safety for employees working on federal and federally financed contracts and subcontracts	Labor - WHD
MSPA	Protects migrant and seasonal agricultural workers in their dealings with farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing	Labor - WHD
Benefits		
ERISA	Establishes uniform standards for employee pension and welfare benefit plans, including minimum participation, accrual and vesting requirements, fiduciary responsibilities, reporting and disclosure requirements	Labor - PWBA,[c] PBGC[d], IRS[e]
COBRA	Provides for continued health care coverage under group health plans for qualified separated workers for up to 18 months	Labor - PWBA Treasury - IRS
Unemployment Compensation	Authorizes funding for state unemployment compensation administrations and provides the general framework for the operation of state unemployment insurance programs	Labor - ETA[f]
FMLA	Entitles employees to take up to 12 weeks of unpaid, job-protected leave each for specified family and medical reasons such as the birth or adoption of a child or an illness in the family	Labor - WHD
Civil Rights		
Title VII	Prohibits employment or membership discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin; prohibits discrimination in employment against women affected by pregnancy, childbirth, or related medical condition	EEOC[g]
Equal Pay Act	Prohibits discrimination on the basis of sex in the payment of wages	EEOC
EO 11246	Prohibits discrimination against an employee or applicant for employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors, and requires federal contractors and subcontractors to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex, or national origin	Labor - OFCCP[h]
ADEA	Prohibits employment discrimination on the basis of age against persons 40 years and older	EEOC
ADA	Prohibits employment discrimination against individuals with disabilities; requires employer to make "reasonable accommodations" for disabilities unless doing so would cause undue hardship to the employer	EEOC

(continued)

Statute	Description	Principal enforcement agency
Rehabilitation Act (Section 503)	Prohibits federal contractors and subcontractors from discriminating in employment on the basis of disability and requires them to take affirmative action to employ, and advance in employment, individuals with disabilities	Labor - OFCCP
Anti-retaliatory provision - STAA	Prohibits the discharge or other discriminatory action against an employee for filing a complaint relating to a violation of a commercial motor vehicle safety rule or regulation or for refusing to operate a vehicle that is in violation of a federal rule, or because of a fear of serious injury due to an unsafe condition	Labor - OSHA[i]
Occupational Health and Safety		
OSHA	Requires employers to furnish each employee with work and a workplace free from recognized hazards that can cause death or serious physical harm	OSHA
MSHA	Requires mine operators to comply with health and safety standards and requirements established to protect miners	MSHA[j]
Drug Free Workplace Act	Requires recipients of federal grants and contracts to take certain steps to maintain a drug free workplace	OFCCP
Labor Relations		
NLRA	Protects certain rights of workers including the right to organize and bargain collectively through representation of their own choice	NLRB[k]
LMRDA	Requires the reporting and disclosure of certain financial and administrative practices of labor organizations and employers; establishes certain rights for members of labor organizations and imposes other requirements on labor organizations	Labor - OAW[l]
Railway Labor Act	Sets out the rights and responsibilities of management and workers in the rail and airline industries and provides for negotiation and mediation procedures to settle labor-management disputes	NMB[m]
Employment Decisions: Hiring and Separations		
Polygraph Protection Act	Prohibits the use of lie detectors for pre-employment screening or use during the course of employment	Labor - WHD
Veterans Reemployment Act	Provides reemployment rights for persons returning from active duty, reserve training, or National Guard duty	Labor - VETS[n]
IRCA (employment provisions)	Prohibits the hiring of illegal aliens and imposes certain duties on employers; protects employment rights of legal aliens; authorizes but limits the use of imported temporary agricultural workers	Labor - WHD
WARN	Requires employers to provide 60 days advance written notice of a layoff to individual affected employees, local governments, and other parties	None[o]

(Table notes on next page)

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Wage and Hour Division.

[c]Pension Welfare Benefit Administration.

[d]Pension Benefit Guaranty Corporation.

[e]Internal Revenue Service.

[f]Employment and Training Administration.

[g]Equal Employment Opportunity Commission.

[h]Office of Federal Contract Compliance Programs.

[i]Occupational Safety and Health Administration.

[j]Mine Safety and Health Administration.

[k]National Labor Relations Board.

[l]Office of the American Workplace.

[m]National Mediation Board.

[n]Veterans' Employment and Training Service.

[o]Although ETA wrote WARN's implementing regulations, there is no principal enforcement agency because the law is enforced privately through the courts.

Over the last 60 years, the Congress, largely relying on its constitutional authority to regulate interstate commerce, has enacted laws expanding the federal regulation of workplace activity to many new areas such as child labor, pensions, labor-management relations, and occupational safety and health.[12] In many of these areas federal regulation followed scattered state efforts to regulate the workplace. For example, Massachusetts passed the nation's first child labor law in 1836 and the first factory inspection law to improve occupational safety and health in 1877.

Most of the statutes and the executive order comprising the framework of federal workplace regulation were put in place during three periods: 1931 to 1940, 1963 to 1974, and 1986 to 1993. (See figure 2.1.) Those statutes that the Congress enacted before 1940 either set basic labor standards regulating minimum wages, prevailing wages, or overtime pay (for example, the Fair Labor Standards Act and the Davis-Bacon Act) or

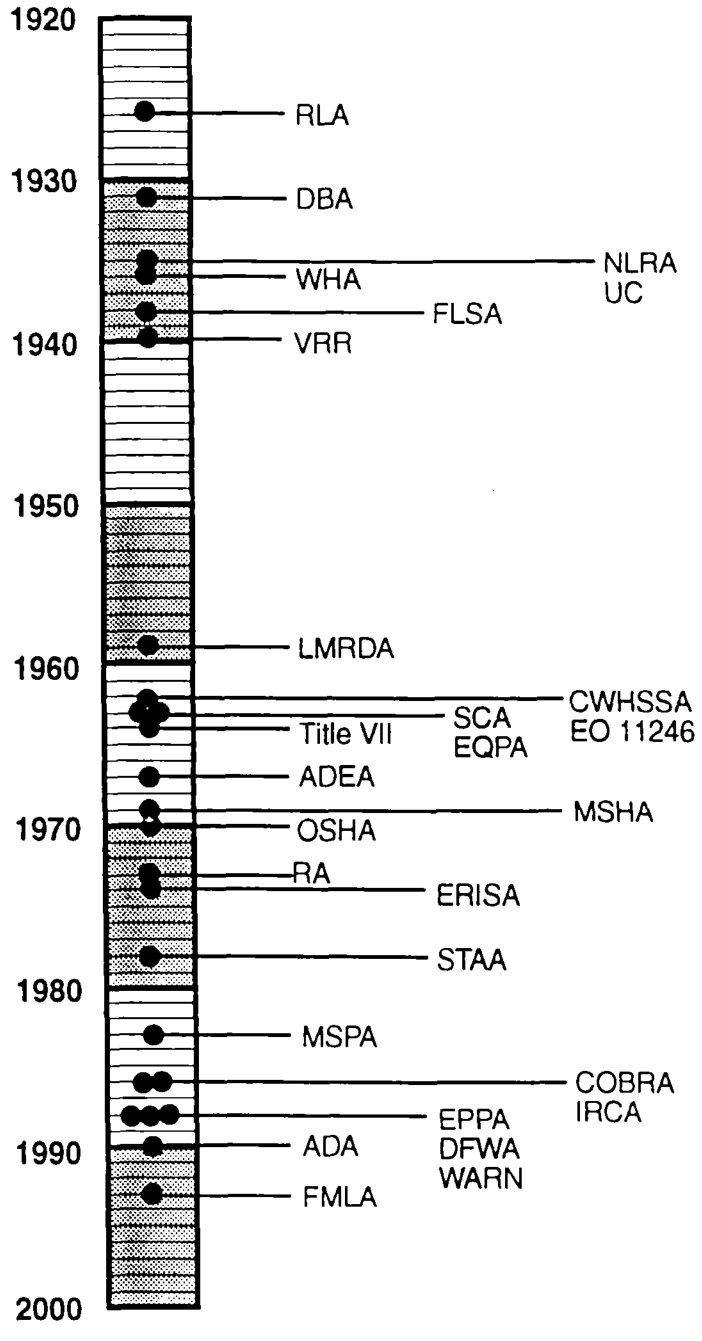
[12]The Constitution gives the Congress the authority to regulate interstate commerce. A large fraction of the workforce is engaged in interstate commerce. For example, Labor's Wage and Hour Division, which, among other laws enforces the Fair Labor Standards Act (FLSA), estimates that the FLSA covers about 113 million workers—96 percent of the workforce—through its interstate commerce provision.

established broad rules governing the conditions under which workers and employers may bargain collectively (Railway Labor Act and the National Labor Relations Act).[13] While 7 statutes had been enacted by 1940, only 8 major statutes were in place as of 1960. The Congress initiated a second wave of workplace legislation during the 1960s and early 1970s that addressed civil rights issues, and regulated new areas such as employee pensions. This activity increased the number of statutes and executive orders enacted to 16 by 1970 and 19 by 1980. Finally, during the mid-1980s the Congress passed a series of labor standard statutes that addressed generally narrower workplace issues not covered during the two earlier periods. For example, the Employee Polygraph Protection Act addresses the use of polygraphs in the workplace and the Workers' Adjustment Notification and Retraining Act (WARN) addresses the issue of employee notification of layoff in the event of a reduction in business operations.[14]

[13]The main difference between these two kinds of statutes is that the agreements reached under the latter type—labor-management statutes—are directly protective only of employees in unionized workplaces where bargaining has been successful. These agreements do not affect nonunionized workplaces or those where, for one reason or another, agreements are not achieved. On the other hand, basic labor standards mandate minimum protection of all employees, without regard to union status.

[14]These laws provide a narrower scope of protections than the Occupational Health and Safety Act which addresses more wide-ranging issues of workplace safety and health, and the National Labor Relations Act, which governs collective bargaining issues between employers and unions.

Figure 2.1: Legislative Chronology



ADEA	Age Discrimination in Employment Act
ADA	Americans With Disabilities Act
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985
CWHSSA	Contract Work Hours and Safety Standards Act
DBA	Davis-Bacon Act
DFWA	Drug-Free Workplace Act
EPPA	Employee Polygraph Protection Act
ERISA	Employee Retirement Income Security Act
EQPA	Equal Pay Act (amendments to the Fair Labor Standards Act)
EO 11246	Executive Order 11246
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
IRCA	Immigration Reform and Control Act (amendments to the Immigration and Nationality Act)
LMRDA	Labor-Management Reporting and Disclosure Act
MSHA	Federal Mine Safety and Health Act
MSPA	Migrant and Seasonal Agricultural Worker Protection Act
NLRA	National Labor Relations Act
OSHA	Occupational Safety and Health Act
RLA	Railway Labor Act
RA	Rehabilitation Act - Section 503
SCA	Service Contract Act
STAA	Surface Transportation Assistance Act (Anti-retaliatory provision)
Title VII	Title VII of the Civil Rights Act
UC	Unemployment compensation provisions of the Social Security Act
VRR	Veterans' reemployment rights provisions of the Selective Training and Service Act
WHA	Walsh-Healey Act
WARN	Workers Adjustment and Retraining Notification Act

This growth in workplace regulation occurred as federal and some state governments increased regulation in other areas such as environmental safety and consumer protection. For example, the Congress has increased regulation of pharmaceuticals, consumer products, and the environment as illustrated by the creation of the Food and Drug Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency, among others.[15]

Workplace Regulation Today: Complex and Varied

Employers and workers currently face an extensive network of workplace requirements covering a wide variety of workplace activities. The framework of federal workplace regulation provides a wide variety of rights for employees and due process protections for employers. Many sources of regulatory change, such as congressional, agency, and review commission actions, and judicial interpretation can affect employers' and workers' rights and responsibilities. Employers also face a combination of federal and state laws that further increase regulatory responsibilities. The actual number of requirements that affect a particular employer varies primarily by its size, industry, and in some cases its clients.

Employers Face Combination of Federal and State Workplace Regulation

Because federal, state, and local governments have authority to regulate various workplace activities, employers face a complicated interaction of workplace statutes and regulatory requirements. This complexity occurs because of the varied nature of the federal-state relationship within each of these areas of workplace regulation. (See figure 2.2.) The regulatory relationships fall into three general categories: federal dominance or preemption; dual control, in which the states exercise varying degrees of authority depending on the activity; and a defined federal-state "partnership." Most workplace activities are subject to some form of dual federal-state control.

[15]State and local governments have also been active in regulating employers in areas such as insurance and consumer protection.

Figure 2.2: Relationship of Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation to State Law[a]

Statute	Federal law generally preempts state law	Federal law does not preempt stricter state requirements	State-federal partnerships
Labor Standards			
FLSA		✓	
Davis-Bacon Act		✓	
Service Contract Act		✓	
Walsh-Healey Act		✓	
CWHSSA		✓	
MSPA		✓	
Benefits			
ERISA	✓		
COBRA	✓		
Unemployment Compensation			✓
FMLA		✓	
Civil Rights			
Title VII		✓	
Equal Pay Act		✓	
EO 11246		✓	
ADEA		✓	
ADA		✓	
Rehabilitation Act (Section 503)		✓	
Anti-retaliatory provison-STAA[b]			
Occupational Health and Safety			
OSHA	✓		✓
MSHA		✓	
Drug Free Workplace Act		✓	
Labor Relations			
NLRA	✓[c]		
LMRDA		✓[c]	
Railway Labor Act	✓		
Employment Decisions: Hiring and Separations			
Polygraph Protection Act		✓	
Veterans' Reemployment		✓	
IRCA	✓		
WARN		✓	
Total	6	19	2

[a]Many statutes are complex and contain a multitude of requirements, rights and remedies. The information presented has been simplified for illustrative purposes.

[b]STAA does not explicitly preempt state law and various conflicting case law on the issue.

[c]Federal law preempts state law with regard to improprieties in the election of union officers.

The Congress has constitutional authority to preempt state regulation of any aspect of workplace activity in interstate commerce. Federal preemption of state regulation may be explicitly stated in a statute or may be implied from a statute's broad and comprehensive scope of coverage. However, the mere enactment of federal legislation in a particular area does not supersede state law regulation in that area.[16] Federal law does not supersede state law unless the Congress has shown a clear intention to do so or there is an irreconcilable conflict between the federal and state law.[17] ERISA, for example, is one of the few statutes in the area of workplace regulation that explicitly provides for federal preemption. A few of the statutes we reviewed have been held by the courts to preempt state regulation because of the comprehensive nature of the statute. For example, immigration laws, which would include the Immigration Reform and Control Act (IRCA), have been held to preempt state law because the federal law provides for such a broad and comprehensive plan that state law ". . .stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[18] Similarly, the National Labor Relations Act (NLRA) has been held to preempt state regulation of activities covered by that act, except in the area of union security provisions.[19]

The Congress has allowed federal and state efforts to regulate the workplace to coexist in different forms. Some laws, such as FLSA, provide that states may enact requirements exceeding those in the federal statute. For example, some states such as California have child labor law provisions that are more stringent than those specified in the FLSA for some occupations and industries. California restricts hours of work for minors ages 16 and 17 while the federal law allows unlimited hours of work. Other laws, such as Title VII, provide for concurrent federal and state jurisdiction through coordinated enforcement. Title VII requires complaints of unlawful employment practices to first be filed at the state or local level if state or local law prohibits the alleged practice. A

[16]Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

[17]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[18]Hines v. Davidowitz, 312 U.S. 52, 67 (1940).

[19]Guss v. Utah Labor Board, 353 U.S. 1 (1957).

complaint may also be filed with the federal Equal Employment Opportunity Commission. To the extent that state and local workplace standards coincide with, or supplement federal requirements, employers may face additional amounts of regulation.

Finally, several laws provide for a more defined federal-state partnership. The Occupational Safety and Health Act allows the states to set safety and health standards where the federal government approves the state program as being at least as effective as the federal program, and provides funds of up to 50 percent of program costs as incentives for states to run the program. Safety and health standards of states that do not have approved programs are preempted by federal regulation—even if the state standards are more stringent—unless no federal standard exists for the area. The federal Unemployment Compensation program provides for federal-state coexistence in another similar way; it provides federal funds to states to run their own unemployment compensation programs that must be approved by the federal government.[20]

Employers and Unions Face Many Sources of Regulatory Change

The regulatory environment is constantly changing. A multitude of sources affect the regulatory environment: congressional action, agency issuance of new and revised regulations, new interpretations by review commissions of existing rules, and administrative and judicial decisions may also alter the regulatory responsibilities of employers and the protections afforded to workers. To keep up with new regulatory developments, employers, unions, and workers need to monitor many of these sources on a regular basis. These actions take place on federal, state, and local levels.

The Congress may change laws resulting in new workplace requirements and regulations; some laws have been amended numerous times since their enactment. For example, the Fair Labor Standards Act has been amended 25 times since its enactment in 1938 and the federal Unemployment Compensation Insurance (UI) provisions have been amended 21 times through 1987.[21] In both cases, the amendments often broadened the scope of legislative coverage, granting rights to workers and placing new responsibilities on employers who were previously

[20]States have considerable autonomy in setting eligibility amounts and other key provisions of their unemployment insurance programs. See Unemployment Insurance: Trust Fund Reserves Inadequate (GAO/HRD-88-55, Sept. 26, 1988).

[21]See Unemployment Insurance: Trust Fund Reserves Inadequate (GAO/HRD-88-55, Sept. 28, 1988), pp. 107-108. In addition, P.L. 102-318, enacted in 1992, extended emergency UI benefits to 33 weeks.

exempt from coverage. The Congress has also modified regulatory requirements by passing specific riders to appropriations bills that are reauthorized on an annual basis. For example, the Congress has annually passed restrictions on health and safety inspections of workplaces with 10 or fewer workers since the late 1970s and, more recently, restrictions on the implementation of prevailing wage laws affecting construction helpers.

Federal agencies are also a major source of regulatory change—they issue regulations that precisely define the responsibility or obligations of employers and others under the law. The Department of Labor issues regulations under a number of laws affecting the workplace. For example, Labor issues regulations under OSHA that set specific limits on employee exposure to hazardous substances, such as asbestos and lead, and set out measures that employers must take to protect employees from exposure to these hazards.

Independent review commissions, administrative tribunals, and the courts also affect regulatory requirements by issuing decisions interpreting the law. For example, administrative law judges in Labor issue decisions on how various laws, such as FLSA and CWHSSA, should be applied to findings of fact.

Because of the frequency of administrative or judicial decisions, workers' rights and employers' compliance responsibilities are often changed even when the Congress infrequently amends those statutes and few agency regulations are issued. For example, the Congress amended the NLRA significantly only three times since its initial enactment in 1935 and NLRB has rarely promulgated regulations. However, cases brought before administrative law judges may result in changes to requirements affecting employers and employees; the body of case law developed by the NLRB in 1993 alone included more than 1,200 decisions.

For any individual statute, employers and employees must keep abreast of new developments from many of these sources of regulatory change. For example, employers and employees monitoring occupational safety and health regulations must be aware of the federal regulations issued by the Occupational Safety and Health Administration or the state regulations issued by federally approved state occupational safety and health programs. In addition, they must review the regulatory implications of decisions reached by the Occupational Safety and Health Review Commission, an independent agency that adjudicates OSHA enforcement actions, and the consequences of federal court decisions regarding OSHA's regulatory authority, its regulations, enforcement procedures and other issues.

Statutory Coverage Varies Primarily by Employer Size and Industry

The coverage provisions of the major statutes comprising the framework vary by a number of different criteria, including industry, employer size, whether the employer is a federal contractor. (See figure 2.3.) For example, 8 statutes restrict their coverage only to particular industries o occupations. MSHA covers the mining industry alone while the Railway Labor Act covers airlines and rail carriers. Six statutes and 1 executive order only cover employers who have federal contracts or contracts financed with federal funds, and of these, 4 statutes also restrict coverag to employers with federal contracts in specific industries or involving the employment of particular occupations.

Of the 26 statutes and 1 executive order comprising the framework of federal workplace regulation, 16 generally cover employers regardless of their industry or whether or not they are a federal contractor. Of these 16 statutes, there is significant variation in coverage according to an employer's size. All of them cover employers with 100 or more employees and 14 statutes cover employers with 25 or more employees. However, only 9 cover employers with fewer than 15 employees, and 1 of these 9 statutes—ERISA—only covers employers with some form of pension or other welfare benefit plan. (See figure 2.4.) Employers with fewer than 15 employees account for a significant proportion of all employers in the nation. For example, in 1991, 85 percent of all work establishments employed 14 or fewer employees.[22]

The number of federal statutes or executive orders covering a particular employer may vary significantly, given the restrictions in coverage of all 2 statutes and 1 executive order. For example, a federal contractor with over 100 employees who provides tax-qualified pension and health benefits could be subject to up to 23 of the 26 statutes and 1 executive order.[23] In contrast, those employers with 14 or fewer employees who

[22]Establishments are places of work and not employers, so this figure overstates the number of employers with fewer than 15 employees.

[23]This assumes that the employer is not involved in the agriculture, mining, airlines, railway, or trucking industries, and has construction, supply or service contracts with the federal government. Such an employer would be excluded from MSHA, MSPA, the anti-retaliatory provision of STAA, and the Railway Labor Act but covered by all others.

provide no tax-qualified benefits, are not organized by a labor union, and are not federal contractors could be covered by as few as 6 statutes.[24]

[24]These would be FLSA, OSHA, the Unemployment Compensation program, the Employee Polygraph Protection Act, IRCA, and the Equal Pay Act. The NLRA would also cover the employer to the extent that employees engaged in concerted activity.

Figure 2.3: Significant Limitations in the Applicability of the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Minimum number of employees necessary for coverage	Federal contractors: Federal contract necessary for coverage	Federal contractors: Minimum contract size necessary for coverage	Limited to specific industry	Major exemptions
Labor Standards					
FLSA	1				Individuals employed in agriculture by immediate family; employees in executive, administrative, or professional capacity, or outside salesmen
Davis-Bacon Act	1	✓	$2,000	Construction	
Service Contract Act	1	✓	$2,500	Service	
Walsh-Healy Act	1	✓	$10,000	Contractors in materials, supplies or equipment	
CWHSSA	1	✓		Employers of laborers and mechanics	
MSPA	1			Commercial farms	Individuals employed by immediate family members, labor unions, nonprofit organizations, any custom combine, hay harvesting, or sheep shearing operation
Benefits					
ERISA[b]	1				
COBRA	20				
Unemployment Compensation	1				
FMLA	50				
Civil Rights					
Title VII	15				Religious corporations, associations, educational institutions, or societies with respect to the employment of individuals of a particular religion to perform work connected with the entity
Equal Pay Act	1				Religiously oriented schools or universities; Indian reservations
EO 11246	1				
ADEA	20				Employees under age 40
ADA[c]	25				
Rehabilitation Act (Section 503)	1		$10,000		
Anti-retaliatory provision-STAA	1			Trucking	Trucks carrying fewer than 10,000 pounds and fewer than 10 passengers including the driver

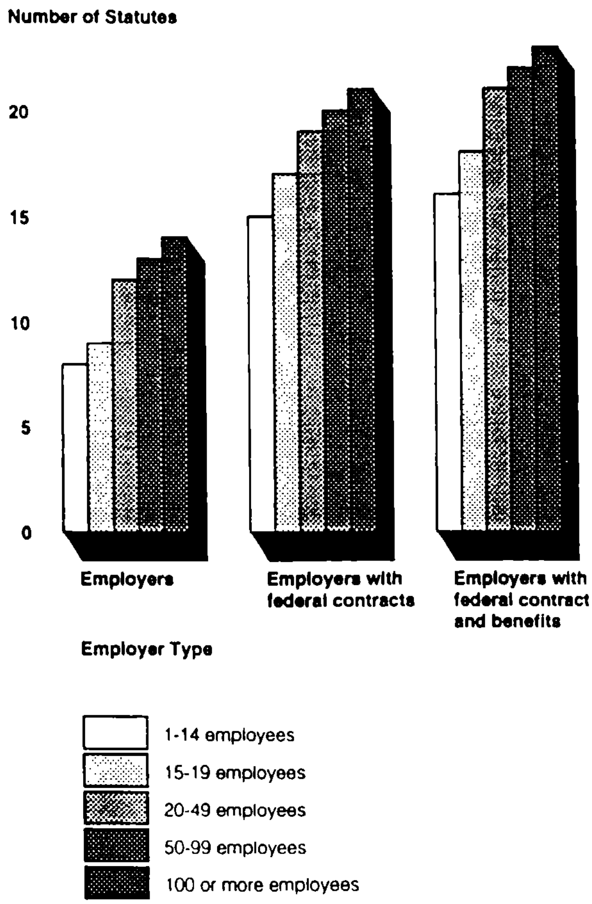
Statute	Minimum number of employees necessary for coverage	Federal contractors: Federal contract necessary for coverage	Federal contractors: Minimum contract size necessary for coverage	Limited to specific industry	Major exemptions
Occupational Health and Safety					
OSHA	1				Working conditions in industries regulated by other federal statutes, for example, mining and nuclear energy
MSHA	1			Mining	
Drug Free Workplace Act	1	✓	$25,000		
Labor Relations					
NLRA	1				Agricultural laborers, domestics, employees covered by the Railway Labor Act, management employees, confidential employees, and supervisors
LMRDA	1				
Railway Labor Act	1			Rail and air carriers	Rail operations in coal mines
Employment Decisions: Hiring and Separations					
Polygraph Protection Act	1				Experts under contract to the Departments of Defense or Energy working on atomic energy; selected employees in security and pharmaceutical industries
Veterans' Reemployment	25				
IRCA	1				
WARN	100				
Total		7	6	8	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies The information presented has been simplified for illustrative purposes.

[b]ERISA covers employers with any number of employees. However, the employer must have provided some form of health, pension or other welfare benefit plan to their employees.

[c]Applies to firms of 15 or more after July 26, 1994.

Figure 2.4: Coverage of Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation, by Employer Size



Note: Figure excludes four statutes that apply only to specific industries but are not federal contractors.

Some statutes cover employers of a particular size but exclude particular classes of employees working for those employers. For example, FLSA, which provides for the payment of minimum and overtime wages by every employer engaged in interstate commerce, excludes professional, administrative and executive employees from certain provisions of the act. NLRB decisions have excluded management and confidential employees from coverage of the NLRA, even when their employer is covered by the act. FMLA allows employers to exclude from coverage the highest paid 10 percent of a covered employer's staff under certain conditions.

Variations in the statutory definition of employer and employee and judicial interpretations of these decisions further complicate the coverage issue. Some statutes, like WARN, exclude part-time employees when determining the number of workers affected to satisfy the statute's provision on coverage. Temporary workers employed by the temporary employment agency and not by the client employer do not count for coverage of the client employer. In other cases, employers may classify workers as independent contractors.[25] Independent contractors are generally not counted to meet the minimum coverage limitations of most statutes and client employers do not have to withhold payroll or social security taxes from the contractor's pay.

nctions for Violations d Employee Recourse ry Widely Among atutes

The major statutes of the framework of federal regulation include a variety of sanctions for violation of their provisions. The most common sanctions are civil nonmonetary remedies, such as reinstatement, hiring, promotion, injunction, or debarment; 24 of the 26 statutes and 1 executive order provided for either debarment or some other nonmonetary remedy, such as an injunction, or the reinstatement, hiring or promotion of an employee. (See figure 2.5.) Other common statutes provided for monetary sanctions. For example, 17 statutes permitted the reimbursement of unpaid wages to the affected employee.

[25]Independent contractors are self-employed workers who provide services. Employers must notify the Internal Revenue Service (IRS) when they classify an employee as an independent contractor. The IRS applies a set of criteria for determining whether a worker is an independent contractor. See glossary.

Figure 2.5: Enforcement Sanctions and Remedies Available Under the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Civil monetary penalties (maximum)	Other civil sanctions				Criminal Sanctions (maximum)
		Monetary remedies		Equitable remedies		
		Unpaid wage	Liquidated or punitive damages[b]	Debarment	Other	
Labor Standards						
FLSA	$10,000 for each child labor violation; $1,000 for each repeat or willful violation of minimum wage or overtime requirements	✓	✓		✓	6 months imprisonment for repeat; $10,000 or 6 months imprisonment for willful violations
Davis-Bacon Act		✓		✓	✓[c]	
Service Contract Act		✓		✓	✓[c]	
Walsh-Healey Act		✓	✓	✓	✓[c]	
CWHSSA	$10 for each day of violation	✓	✓	✓	✓[c]	$1,000 and/or 6 months imprisonment
MSPA	$1,000 per violation	✓			✓[d]	$1,000 and/or 1 year for willful violation; $10,000 and/or 3 years for repeat and willful violation
Benefits						
ERISA	Up to $1,000 per day for reporting requirements Up to 5% of the amount of a prohibited transaction; up to 100% if not corrected within 90 days[f]				✓[e]	$5,000 and/or imprisonment of 1 year; $100,000 for a corporation
COBRA	$100 per day for failure to comply with notice requirements				✓[e]	
Unemployment Compensation[g]						
FMLA	$100 for each willful violation of posting requirements	✓	✓		✓[h]	
Civil Rights						
Title VII	$100 for each willful violation of posting requirements	✓	✓		✓[h,i]	State or local criminal penalties may apply

Statute	Civil monetary penalties (maximum)	Other civil sanctions: Monetary remedies: Unpaid wage	Other civil sanctions: Monetary remedies: Liquidated or punitive damages	Other civil sanctions: Equitable remedies: Debarment	Other civil sanctions: Equitable remedies: Other	Criminal Sanctions (maximum)
Equal Pay Act	$100 for each willful violation	✓	✓		✓[h]	6 months for report violations
EO 11246		✓		✓	✓[i]	
ADEA		✓	✓		✓[h]	$500 for interfering with authorized EEOC representative and/or up to 1 year imprisonment for repeat interference
ADA		✓	✓		✓[h,i]	State or local criminal penalties may apply
Rehabilitation Act (Section 503)		✓		✓	✓[i]	
Anti-retaliatory provision-STAA		✓			✓[h]	
Occupational Health and Safety						
OSHA	$5,000 to 70,000 for each willful violation; up to $70,000 for each repeat violation; up to $7,000 for serious, other-than-serious, or posting violation or for each day of failure to abate hazard				✓[j]	$500,000 for a corporation and $250,000 and/or 6 months imprisonment for an individual for a willful violation that results in death of employee; 1 year if prior conviction $200,000 for an organization and $100,000 and/or 6 months imprisonment for an individual for false statements in a required certified document
MSHA	$50,000 for each violation; $5,000 per day for failure to abate hazard; miners may be fined up to $250 for willful violation of smoking standards				✓[k]	$500,000 for an organization and $250,000 and/or 1 year imprisonment for an individual for willful violation; 5 years for repeat and willful violation $500,000 for an organization, $250,000 and/or 5 years imprisonment for making false statements in a required certified document
Drug Free Workplace Act				✓	✓[l]	

Statute	Civil monetary penalties (maximum)	Other civil sanctions				Criminal Sanctions (maximum)
		Monetary remedies		Equitable remedies		
		Unpaid wage	Liquidated or punitive damages[b]	Debarment	Other	
Labor Relations						
NLRA	[k]				✓[i]	[k]
LMRDA	$10,000				✓[i]	$10,000 and/or 5 years imprisonment for violation of fiduciary provisions, $10,000 and/or 1 year imprisonment for willful violation of bonding provisions
Railway Labor Act						$20,000 and/or imprisonment of 6 months for offense and each day of willful refusal to comply
Employment Decision: Hiring and Separations						
Polygraph Protection Act	$10,000	✓			✓[h,j]	
Veterans' Reemployment		✓			✓[c,h]	
IRCA	$1,000 per violation for misrepresentation of material fact or failure to perform obligation(s); $10,000 for hiring illegal aliens				✓[d]	$3,000 and/or imprisonment of 6 months for each violation
WARN	$500 per day	✓				
Total		17	8	7	24	
	14	17		24		13

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Liquidated damages is a monetary estimate of actual damages, punitive damages is damages as a form of punishment that is above the actual loss suffered.

[c]Breach of contract provisions invoked.

[d]Suspension of revocation of special employment privilege.

[e]Elimination of tax deductibility of plan contributions.

[f]Employers may also be fined 20 percent of the amount recovered from a fiduciary violation pursuant to a settlement agreement or court order involving the Secretary.

[g]Sanctions targeted top noncomplying state UI program.

[h]Reinstatement, hiring, or promotion.

[i]Restraining order or injunction

[j]Abatement of hazard; imminent danger situations.

[k]Miners can be ordered withdrawn from the mine until hazard is abated.

[l]There are penalties for interfering with the performance of the duties of a member of the NLRB or its agents.

More than half (14) of the 26 statutes and 1 executive order provide for the assessment of civil monetary penalties in the event of a violation. Maximum penalties range from $1,000 to $70,000. However, in many cases the average assessed penalties are far lower. For example, in 1993, the maximum penalty permitted for a serious OSHA violation was $7,000 and for a child labor law violation it was $10,000. However, the average penalty actually assessed for a serious federal OSHA violation was $750 and for a FLSA child labor violation, $909. Similarly, 13 laws provided for criminal sanctions in the event of egregious violations. However, at least in some cases, these are rarely applied. For example, FLSA criminal sanctions for child labor violations have never been successfully pursued and, since 1989, OSHA has referred fewer than 50 cases for criminal action, only a small percentage of which have been pursued by the Justice Department.

Enforcement and Due Process Provisions Include Alternative Dispute Resolution

The major statutes and the executive order comprising the framework of federal workplace regulation provide various means for employees and agencies to enforce regulatory sanctions as well as corresponding protections for employers. (See figure 2.6.) These enforcement and due process provisions vary for employees and employers and from statute to statute. About half of the statutes permit employees a private right of action—the right to sue in court on their own behalf to obtain relief outside of the enforcement agency's action. Depending on the statute, employers also have a variety of protections and recourse, including informal meetings and negotiation before any adverse action, administrative hearings, and appeals to court. In addition, some statutes and implementing regulations provide for alternative dispute resolution procedures such as informal conferences and mediation.

An employee's ability to initiate a private right of action varies by statute. (See figure 2.6.) Some statutes give employees the unqualified right to sue the employer. For example, more than half (17) of the 26 statutes and 1 executive order we reviewed give employees the right to sue in court on their own behalf to obtain relief outside of the enforcement agency's action. However, some of these statutes qualify that right—3 of these 17 laws require the employee to exhaust administrative remedies before instituting a lawsuit. Another 4 of these 14 statutes extinguish the employee's right of action if the cognizant federal agency institutes court action on their behalf.

Although they may not permit employees to sue in court to obtain relief outside of the agency's action, another 8 of the statutes in the framework give employees the right to challenge an employer's action by filing a complaint with an administrative agency. The administrative agency is empowered to conduct a hearing and issue an order ruling on the issues raised in the complaint. Under these statutes, the employee has the right to then appeal unsatisfactory decisions.

The major statutes and the executive order comprising the framework of federal workplace regulation provide different time periods within which employees may file lawsuits in court. Many statutes such as the FLSA, FMLA, and the Employee Polygraph Protection Act generally permit a private right of action to be filed within two or three years of the employer's alleged violation.[26] Under the FLSA, section 503 of the Rehabilitation Act and the ADA, employees may not sue until notified by the appropriate agency that the agency will not be filing suit on their behalf, which may be too late to fall within the period the employee is allowed to sue. A couple of statutes, such as ERISA which allows 6 years in some cases and the Veterans' Reemployment Rights law, which explicitly provides that no time limit applies, provide a longer time period to file in court.

Where a statute requires the exhaustion of administrative remedies, an employee has a much shorter time to institute court action—generally a significant amount of time already has been consumed in the administrative process. These times also vary from statute to statute. For example, under Title VII, the ADEA, and the ADA, an employee has 90 days to act after the exhaustion of administrative remedies; under OSHA 60 days; and under MSHA 30 days.

[26]Under the FLSA, section 503 of the Rehabilitation Act and the ADA, employees may not sue until notified by the appropriate agency that the agency will not be filing suit on their behalf, which may be too late to fall within the period the employee is allowed to sue.

Employers also have a variety of protections and recourse. Employers have the right to an administrative or judicial appeal, or both, under some statutes. Those statutes that authorize an agency to take action against an employer without going to court, such as the NLRA and the Davis-Bacon Act, either explicitly provide or have regulations that provide the employer with the right to have a hearing. Employers (as well as employees) generally have the right to appeal adverse agency decisions to court. The time within which such appeals are required to be instituted varies from 10 days to 60 days, depending on the statute.

Some statutes also provide for alternative dispute resolution procedures—informal means of resolving problems before pursuing traditional legal avenues. A few of the statutes we reviewed require the enforcing agency to attempt to informally settle proposed charges against an employer before proceeding with formal action. For example, Title VII, ADEA, and ADA require the Equal Employment Opportunity Commission to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Regulations under some statutes, such as OSHA and MSHA, provide an opportunity for the employer to request an informal conference to discuss a proposed citation and/or penalty. Two other statutes—the NLRA and the RLA, have provisions that encourage parties involved in labor disputes to use conciliation and mediation to resolve disputes.[27] Even when the statute or regulation does not require such negotiation, many agencies generally are anxious to negotiate settlements with employers.

[27]Title II of the NLRA established an independent agency, the Federal Mediation and Conciliation Service, to settle such disputes through conciliation and mediation.

Figure 2.6: Forms of Recourse Under the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Private right of action available to employee	Private right available after exhaustion of administrative remedies	Number of days to initiate formal appeal of administrative decision
Labor Standards			
FLSA	✓[b]		15
Davis-Bacon Act	✓[c]		30
Service Contract Act			30
Walsh-Healey Act			20
CWHSSA	✓[c]		30
MSPA	✓	✓	30
Benefits			
ERISA	✓	✓[e]	30 for reporting and disclosure violations
COBRA	✓	✓	60
Unemployment Compensation			
FMLA	✓[b]		15
Civil Rights			
Title VII	✓	✓	
Equal Pay Act	✓[b]		
EO 11246			20
ADEA	✓[b]		
ADA	✓	✓	
Rehabilitation Act (Section 503)			20
Anti-retaliatory provison-STAA			30
Occupational Health and Safety			
OSHA			15
MSHA			30
Drug Free Workplace Act			
Labor Relations			
NLRA	✓[d]		
LMRDA	✓[e]		
Railway Labor Act			10
Employment Decisions: Hiring and Separations			
Polygraph Protection Act	✓		
Veterans' Reemployment	✓		
IRCA	✓		
WARN	✓		
Total	17	5	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Private right of action extinguishes if federal agency brings suit on employee's behalf.

[c]Private right of action exists only when government has withheld insufficient amounts from contractor to pay underpaid employees.

[d]Private right of action exists only to enforce the terms of a collective bargaining agreement.

[e]Private right of action is against labor organizations only.

Employers Must Comply With Many Paperwork and Recording Rules

Virtually all of the statutes and the executive order comprising the framework of federal workplace protections require employers to comply with various paperwork or recording duties. These responsibilities take many forms: requiring that forms be completed or filed with particular federal agencies, collecting particular business data such as payroll records (FLSA), filing workforce profile information (Title VII of the Civil Rights Act), or recording occupational injury data (Occupational Safety and Health Act). (See figure 2.7.) Fourteen statutes require employers either to post notices in the workplace informing employees of their rights or provide written notice or information to employees when particular events occur. For example, employers must post a notice approved by the Secretary of Labor explaining a worker's rights and responsibilities to take family and medical leave under FMLA, and must issue a revised Summary Plan Description to all plan participants whenever there is a material change in a pension plan under the Employee Retirement Income Security Act. In addition, every statute and executive order which requires records to be kept requires the retention of records for at least 1 year, but more typically for 3 years or more.

Figure 2.7: Reporting and Disclosure Requirements of Major Federal Workplace Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Reporting/disclosure requirements				
	Forms must be completed or filed with agency	Payroll or other business data must be collected	Notices must be posted in workplace	Data on injuries and/or complaints required	Years records must be maintained
Labor Standards					
FLSA		✓	✓		2-3
Davis-Bacon Act	✓	✓	✓		3
Service Contract Act		✓	✓		3
Walsh-Healey Act		✓	✓		2-3
CWHSSA	✓	✓			3
MSPA	✓	✓	✓		3
Benefits					
ERISA	✓		✓		6
COBRA					
Unemployment Compensation	✓	✓			3
FMLA		✓	✓		2-3
Civil Rights					
Title VII	✓	✓	✓	✓	1-3
Equal Pay Act		✓	✓	✓	2-3
EO 11246	✓	✓	✓		
ADEA		✓	✓	✓	1-3
ADA		✓	✓	✓	1-3
Rehabilitation Act (Section 503)			✓	✓	1
Anti-retaliatory provison-STAA					
Occupational Health and Safety					
OSHA	✓		✓	✓	5[b]
MSHA	✓		✓	✓	1[c]
Drug Free Workplace Act	✓		✓	✓	1-5
Labor Relations					
NLRA			✓[d]		
LMRDA	✓				5
Railway Labor Act			✓		
Employment Decisions: Hiring and Separations					
Polygraph Protection Act	✓		✓		3
Veterans' Reemployment					
IRCA	✓	✓	✓		3
WARN			✓[e]		
Total	13	14	21	8	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Records of employee exposures must be retained for 30 years because of long latency periods associated with chronic illnesses.

[c]Records of mine accidents, injuries, and illnesses must be retained for 5 years.

[d]Posting required in certain remedies.

[e]Although WARN has no requirements for posting information, it requires the notification of all affected employees and other selected parties of a reduction in operations.

Small Employers Reported More Contracting Out as Part of Compliance Strategy

Employers we talked to typically had different compliance strategies depending on their size, with smaller employers more likely to contract out key workplace requirements than larger employers. Small employers we interviewed more generally relied on outside legal staff; contracted out their health, pension, and other benefits administration; and often relied on contractors for payroll processing. Some employers of all sizes relied on unions to administer their health and pension plans as part of their collective bargaining agreement. In contrast, large employers reported that they generally maintained in-house human resource departments, health and safety units, and legal staff to comply with many workplace requirements.[28] The larger companies were also more likely to administer their own health and welfare plans. However, some ERISA pension benefit requirements were considered to be so complex that even many larger companies said they contracted out for compliance duties, such as the filing of Form 5500.

Partly because of the complexity of the requirements, some large employers we talked to who were federal contractors relied on outside expertise to administer their affirmative action plans, including their annual affirmative action reports, for compliance with the Office of Federal Contract Compliance Programs.

[28]Although many maintained their own legal staff, some larger employers also reported selectively using outside legal staff for certain types of litigation.

Workplace Regulation Important but Not Sole Regulatory Concern for Many Employers We Interviewed

Employers that we interviewed said that federal workplace regulation was an important business concern but often not the most important regulatory issue they faced. Small employers often reported primary concern with nonfederal or nonworkplace regulations,[29] while larger employers were more likely to focus on federal workplace regulation.[30] Most of the employers we spoke to said that nonworkplace or industry-specific regulations were cited as at least as important or more important than workplace regulations. This was true regardless of employer size, although workplace issues were generally less of a concern for smaller employers. Employers of all sizes and union representatives we talked to believed that federal workplace regulations were significant but other types of regulations equaled or overshadowed their importance. A small diner owner said that state health and county liquor regulations are predominant concerns:

"Without a liquor license and a clean bill of health, I'd be out of business."

Several employers were more concerned about the difficulties of complying with environmental or tax regulations than with workplace regulations. For example, a small homebuilder explained how state and county environmental laws cause "the biggest headaches" for him:

"Worksites have had almost daily inspections of erosion control and solid waste... Subcontractors and utility companies often create erosion problems at sites...then we're held responsible...Hazardous chemical regulations are so strict and detailed that even haulers must have state permits. This makes it very difficult and expensive to get rid of waste. The Clean Air Act causes confusion because of conflicting signals. We used to burn trash but now we don't know what to do with it."

And a medium-size insurance company told us:

"Workplace regulations are a fact of life that we can easily live with. They are doable and pose very few problems. Insurance industry regulations and tax requirements are much more complicated and take more time to administer than workplace regulations. One employee's time is devoted solely to calculating the amount of insurance funds that can be built up on a policy; any miscalculation results in hefty IRS fines."

[29]The exemption of smaller employers from many federal workplace statutes—COBRA, WARN, FMLA, and many civil rights laws—may contribute to this perspective. See figure 2.4 for the statutory coverage of the framework of federal workplace regulation.

[30]Some large employers we spoke with pointed out that because we interviewed human resource personnel, they placed great significance on workplace-related issues. They said that their tax or legal departments might have provided a different view.

Unions made similar comments about employers where they represented workers. For example, an official from an international union said:

"In most of our industries, employers would quickly give in on all of the workplace regulation, and in other areas too, if they could get out of a lot of the environmental rules they consider overly restrictive...they'd give their right arm for this."

Large employers in labor intensive industries like hotels, retail trade, and temporary employment said that they were more likely to identify federal workplace regulation as the most significant set of regulations affecting their operations. With more employees and high turnover, these employers must process and maintain more paperwork on their staff and train more management employees. Officials at a large retail company, for example, described how:

"The cost of administering workplace regulations is very great when you have a large number of stores and are spread out over many states. It is a truly monumental task for labor-intensive firms like ours which also have high turnover; you are always training management and employees to do new things or bringing others up to speed on items which haven't changed."

High staff levels can make compliance with workplace regulations more of a task. As officials from a large hotel employer described it:

"We must deal with many employees and all the individual behavior that comes with that. As a result, compliance is time-consuming and expensive."

Heritage Foundation's Policy Recommendations and List of Experts

<u>Topics</u>

1. Agriculture
2. Budget
3. Congressional Reform
4. Regulatory Reform (cross cutting)
5. Taxes
6. Welfare
7, Labor & Employment
8. Environment
9. Health Care
10. Telecommunications
11. Defense and Military Readiness
12. Foreign Aid
13. Trade
14. Education
15. Crime

Agriculture

Dismantle, by a time certain, the entire current system of subsidies (including target prices, deficiency payments, and marketing loans) and supply controls (including all acreage reduction or set-aside programs) for wheat, feed grains, cotton, rice, and oilseeds.

Farmers should be free to produce what consumers demand, not what government plans. Unnecessary costs would be eliminated by ending central planning, and farmers would have incentives to innovate, to lower costs, and to protect their resource base. The result would be a stronger economy in rural America. Supply control policies have removed, on average, 15 percent of U.S. crop acreage from production annually as agricultural producers in the rest of the world have increased their production to fill the void created by reduced U.S. production.

Modify the loan programs by changing them from non-recourse to recourse loans.

Today, farmers have the option of defaulting on government loans and forfeiting their crops to the government as full repayment. If these loans were changed to normal obligations, they would no longer establish a floor under the commodity price and signal to the rest of the world what a foreign producer must charge for his product to beat the American price. Instead, they would function as a risk-management tool that encourages the farmer to market his crop at the most opportune time.

Eliminate federal crop insurance programs and authority for disaster payments.

Government can encourage farmers to use private insurance and other market-based risk-management tools. Farmers should become more aware, through education and training programs, of opportunities to manage price risk through use of futures or options contracts. Today's farmer must be both an efficient producer and an effective marketer.

Modify the Conservation Reserve Program.

The CRP, which alone idles about 36 million acres per year, includes land that can be put to productive use in sustainable ways. When CRP contracts for such land expire, the acreage should be moved into sustainable productive use. Land that is highly erodible could remain protected in a more carefully targeted conservation reserve program, making the CRP truly a conservation program rather than a supply control program.

Eliminate the Export Enhancement Program.

The EEP, which subsidizes the dumping of U.S. agricultural products on the world market, distorts markets and depresses world prices, undermining certain export markets and harming the nation with the greatest export growth potential -- the United States. Eliminating export subsidies will ultimately improve the global competitiveness of U.S. agricultural products.

Phase out sugar, dairy, and peanut programs.

Because current policies have locked these commodities into a position of noncompetitiveness, these programs should be phased out over a five-year period. Although the dairy program has been the more costly to the U.S. Treasury, the peanut and sugar programs penalize American consumers relative to foreign consumers.

Despite 60 years of the federal government's micromanagement of U.S. agriculture, the economy of rural America continues to decline. The 1995 farm bill provides an opportunity to reverse the policies that have caused that decline. By adopting the policies proposed above, the U.S. Congress can restore U.S. agriculture to a competitive position in the world. It can free U.S. agriculture to use, not waste, its vast resources to produce prosperity and stimulate the creation of jobs in rural America.

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Budget

Enact a budget resolution that redefines the basic functions of the federal government.

the debate will begin in early February when Clinton submits his fiscal 1996 budget to Congress. soon after, the House Budget Committee will begin drafting the Budget Resolution, a non-binding (meaning it is not signed by the President) blueprint outlining the government's spending and revenue priorities for the next fiscal year. The Budget Resolution tells the Appropriations Committees how much they can spend and, if necessary, tells the Ways and Means Committee if changes need to be made in tax or entitlement laws. If the tax or entitlement laws are changed, then these changes are voted on later in what is known as a reconciliation bill.

The Budget Resolution should set out guidelines to truly "reinvent government" spending decisions that reflect the proper functions of the federal government. That document should conform to three basic principles.

Principle #1: The federal government should not engage in functions that are more appropriately in the domain of state and local government. Thus, the Resolution should be a "federalism resolution." The Resolution should remove funding for agencies and programs that should not exist at the federal level, such as the Department of Education and many welfare, health, transportation, and other programs. The money for such programs should either be transferred to the states or returned to the people as federal tax reductions -- leaving the states to decide whether and how to raise appropriate funds from their own citizens.

Principle #2: The federal government should cease activities that should be undertaken by the private sector. Some agencies of the federal government, such as the Energy Department or the Small Business Administration, serve little purpose or actually impose unnecessary costs on the economy. Similarly, some programs, such as the market Promotion Program and many infrastructure grants, are little more than handouts to influential industries or corporations. Funding for such improper functions of government should be eliminated.

In addition, many functions of the federal government should be transferred to the private sector through an aggressive program of privatization similar to those undertaken by other countries. Transfers of this kind can yield considerable short-term revenues for the government while improving the efficiency of services. Examples include the $200 billion direct loan portfolio, the Power Marketing Administrations, many federal buildings and real estate holdings, and some forests. In some cases, such as transferring the ownership of public housing to residents, the aim is not to raise revenue but to change the social dynamics of communities.

Principle #3: The federal government should terminate programs that do not work or are no longer needed. Dozens of obsolete or filed programs remain in the federal budget, thanks to interest group lobbying and pliant committee chairman. it is time to strip out of the budget such programs as the Rural Electrification Administration, the National Helium Reserve, and Impact Aid.

The budget debate is likely to center on the following six [sic] issues:

Use the debt ceiling increase vote to force changes in the budget rules.

The federal debt ceiling, which congress raised to $4.9 trillion with the 1993 budget deal, will most likely have to be raised by August or September of 1995. This "must pass" vote gives enormous leverage to conservatives to demand changes in the budget rules to achieve spending reductions.

Enact family tax relief.

President Clinton pledged during the 1992 campaign to provide middle-class tax cuts. He has yet to fulfill this promise. Republicans in both houses included a $500-per-child tax cut in last year's budget alternative. Conservatives should press vigorously for family tax relief within the framework of the budget debate. Clinton is likely to propose a modest tax cut (perhaps $300 to $400 per child) for a limited group of families, perhaps those below $40,000 per year in income. Clinton will probably opt to pay for this tax cut by raising taxes on the wealthy or limiting tax deductions. Conservatives should insist that the way to pay for general tax relief for families with children is to curb the growth of federal spending, not to impose new taxes on other Americans. The White House sent signals during the November election campaign that it is fearful of getting into a bidding war on tax cuts. Conservatives should raise the ante on tax cuts as long as these cuts are financed only by reductions in federal spending -- not by tax increases.

Pass a Balanced Budget Amendment with tax limitation, and during the ratification process, enact budgets that comply with the amendment.

One of the first major issues that new Members are likely to vote on is the Balanced Budget Amendment to the Constitution. Opponents of the BBA will challenge conservatives to put forward their specific plans to balance the budget before the vote has even taken place. Conservatives should respond by pointing out that the BBA, like every other amendment to the Constitution, is a rule that limits the behavior of government. Once such an amendment is passed by Congress and sent to the states for ratification, it is up to Congress to change its budget rules and make spending decisions to comply with the amendment.

Some lawmakers will argue that it is impossible to cut enough spending to balance the budget and provide a package of tax cuts for American families. This argument is mistaken. Members should understand that tax cuts for families, such as the $500-per-child tax credit proposed in the Contract with America and the fiscal 1996 Senate Republican budget proposal, will ease the political "pain" of a large package of spending cuts, lessening the opposition of special interests who benefit from federal largess. Without the "reward" of a $500-per-child tax cut, few taxpayers will have an incentive to lobby for deep spending cuts, because they would see little immediate benefit from reductions.

Enact entitlement reform.

The Bipartisan Commission on Entitlement and Tax Reform, also known as the Kerrey Commission after Senator Robert Kerrey (D-NE), is due to release its report on December 15. This provides a rare opportunity for bipartisan agreement on entitlement reform. Still, conservatives should beware of "entitlement cuts" that are in fact hidden tax increases. In Washington budgetese, a tax increase can be considered a spending cut if the revenues are used to "offset" the program's spending. One area of entitlement reform that should be pushed vigorously by conservatives is welfare reform. The Clinton "reform" proposal actually would increase welfare spending by at least $10 billion. In addition to structural reforms of the welfare system, conservatives should seek a cap on total welfare spending, which would save as much as $70 billion over five years.

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deficit reduction." This proposal was not voted on in 1994, but it should be in 1995.

Give the President a line-item veto and enhanced rescission authority.

The failed 1994 "enhanced rescission" bill to give the President greater authority to excise wasteful spending will likely be revived in 1995. New Members should be cautious, however, about weak alternatives that do not actually force a vote on these presidential initiatives. Any serious enhanced rescission measure would automatically eliminate any items rescinded by the President unless a majority in Congress voted to block such an action. In such a case, however, the President could veto Congress's rejection, forcing lawmakers to override the veto with a two-thirds vote.

Some Members may, of course, attempt to give the President the same true line-item veto authority that 43 governors already have. This would take the form of a resolution to amend the Constitution. While such an effort is far more difficult to pass, the line-item veto would be a real step toward restoring the fiscal balance between the White House and Capitol Hill.

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Congressional Reform

House Procedures

Among the significant rule changes Republican have pledged to take up on the first day of the new House session are limiting the terms of committee chairmen, cutting committee staffs by one-third, eliminating proxy (ghost) voting in committees, requiring that committee meetings be open to the public, and applying numerous workplace laws through House rules. In addition, conservatives should encourage Congress to:

Reform the committee system.

The House may also consider significant changes in its committee system and additional procedural reforms when it adopts its new rules on January 3. The leading committee reform plan, developed by Representative David Dreier (R-CA), would consolidate the 22 existing full committees into considering smaller reductions in committee staffs in that body. These cuts are an outstanding initial step toward reducing congressional staffs but should be followed by a rigorous review of staffing in administrative and support offices during the appropriations process. Congress should also review executive branch personnel needs and the Ramspeck Act, which permits displaced Hill staff employees to secure positions in the executive branch on a noncompetetive basis. Reducing congressional staffs only to see workers reappear in the executive branch would be a pointless exercise.

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Footnote:

2 When the clerk of the House sends the approved budget to the Senate, the budget resolution and the debt ceiling bill become two separate measures. The Senate does not have a "Gephardt Rule" and votes on each of these measures individually.

Text: Excerpts from Heritage Foundation Briefing Book for New Members of Congress

Regulatory Reform

The new Congress, with its more conservative makeup, is expected to pursue a vigorous strategy intended not just to ease, but to roll back the burden of government regulation. Members should move quickly with reforms, including those mentioned above, that require Congress and the executive branch to consider more carefully the impact of legislation and regulations before they are enacted. In addition to these "process" reforms, Congress should examine closely which regulations and laws, such as those in the environmental and labor area, need to be repealed or overhauled. In pursuing this agenda, conservatives should urge Congress to follow a three-pronged approach.

First, Congress should block Administration attempts to legislate by regulation. Specifically, Congress should:

Impose a 180-day moratorium on all federal regulatory activity, including rulemaking at the independent agencies.

With Republicans now controlling Congress, the Administration is expected to push its agenda through such regulatory agencies as the Food and Drug Administration (FDA), OSHA, and the Environmental Protection Agency (EPA). In fact, the recently released semi-annual regulatory agenda shows that the Administration has aggressive plans in these areas.

One of the first actions Congress should take in January is to enact a freeze on current rulemaking. This would give Congress time to conduct oversight hearings to review the Administration's agenda and ensure that the White House is not trying to evade congressional consideration of its proposals. Exceptions to the moratorium can be made for regulations responding to emergency situations or for those whose postponement would conflict with statutory or judicial deadlines.

Second, Congress should implement permanent reforms of the regulatory process similar to those in the Contract With America. These include enacting unfunded mandate reform and strengthening the Paperwork Reduction and Regulatory Flexibility Acts. In addition, the Contract would require the federal government to perform risk assessment and cost-benefit analysis for proposed regulations and compensate property owners when the government takes their property.

Congress also should enact, as the Contract proposes, the following reforms which would dramatically change how the federal government regulates the economy:

Impose a regulatory budget on the federal government.

A regulatory budget would place a ceiling on the total estimated cost that could be imposed on the economy each year by all federal regulations. If the budget total was reached by existing regulations, an agency wishing to add new ones with further costs would have to repeal or modify existing regulations imposing the same or greater cost. This proposal would force the government to prioritize its regulations and abolish those that are no longer needed.

Provide whistleblower protection for victims of regulatory harassment.

Just as the federal government protects those who blow the whistle on fraud and waste inside government, similar protection should be extended to private citizens who complain about harassment from federal regulators. Many citizens are afraid to speak out on the excesses of some regulatory agencies because they fear retribution. Government regulators should be held accountable for such abuses through civil penalties, with injured businesses or individuals allowed to take civil action against the government official who harassed them.

Codify OMB's authority to review regulation.

President Ronald Reagan's Executive Order 12291 gave the Office of Management and Budget (OMB) – specifically, OMB's Office of Information and Regulatory Affairs (OIRA) -- the authority to assess the cost and benefits of agency rulemaking. Fortunately, the Clinton Administration retained this basic regulatory review structure. But to ensure that subsequent Administrations do not eliminate cost-benefit review of regulations, OIRA should have statutory authority to ensure that agencies consider proposed rules thoroughly. This means agencies should perform risk assessment and cost-benefit analyses, estimating the paperwork burden and justifying each proposal as representing the least costly and intrusive approach.

Estimate the cost of both private and public sector mandates.

Since it is expected that unfunded federal mandate reform will be enacted in 1995, it is important that this legislation also require that Congress estimate the cost of regulations on the private sector -- as well as on state and local governments. Although the CBO and the White House have fought this additional responsibility in the past, it is blatantly unfair to the private sector for Congress to focus solely on the cost of mandates to state and local governments.

Third, conservatives should press Congress to undertake a long-overdue review of certain regulations. Specifically, Congress should:

Hold oversight hearings immediately on burdensome regulations and laws.

Although these hearings could be conducted by the committees of jurisdiction, Congress should establish a temporary select committee on deregulation to provide Members with a comprehensive picture of the overall burden of regulation on the economy. These hearings would provide an excellent forum for business and property owners and for other victims of excessive federal regulation who could travel to Washington to explain their horror stories directly to federal lawmakers. Federal regulators should be required to testify at these hearings, both to justify the regulations and to suggest how to change them.

Topics to be discussed at such a forum include Superfund, Clean Air Act implementation, OSHA and FDA policies, the Americans With Disabilities Act, and the Community Reinvestment Act. From these hearings, Congress would retrieve ideas to begin rolling back the most burdensome rules.

The 104th Congress provides the best opportunity since 1981 to reduce the burden of government red tape. Despite the recent growth in federal regulation, legislators during the past six years could not even pass bipartisan regulatory process reform proposals like the one strengthening the Regulatory Flexibility Act. Members now have the chance not only to pass these measures, but to enact dramatic reforms like a regulatory budget and to consider repealing or overhauling burdensome regulations and agencies.

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Taxes

It is widely expected that family tax relief legislation will be offered in the 104th Congress and that supporters of lower taxes and smaller government will be considerably bolder than they were in 1994. Family tax relief is also likely to be proposed by the Clinton Administration, although this relief probably will be offset by hikes in other taxes. Members also may find themselves considering the merits of broader tax reform proposals, such as the flat tax proposed by Representative Richard Armey (R-TX) and the Savings-Exempt-Income Tax offered by Senators Pete Domenici (R-NM) and Sam Nunn (D-GA). This measure would eliminate taxation of savings and investment income but maintain a "progressive" rate structure.

This focus on tax cuts when the 104th Congress goes into session would be a very welcome development for the economy. Large tax increases in recent years have stifled economic growth, lowering incomes and hindering job creation. When Ronald Reagan left office in January 1989, the Congressional Budget Office (CBO) projected that the budget deficit (only $150 billion at the time) would continue falling every year as long as Reagan's policies were left in place.[1] This estimate, incidentally, assumed that there would be no additional deficit reduction as a result of the Gramm-Rudman-Hollings deficit reduction law.

Unfortunately, Reagan's successors chose not to continue his policies. George Bush presided over a large tax increase in 1990 (this tax bill also gutted the Gramm-Rudman law). As many predicted, this tax increase weakened the economy and was followed by higher budget deficits, not by the reduction in red ink promised by supporters of the tax hike. President Clinton continued Bush's tax-increase policies. Not surprisingly, the tax hike has slowed economic growth and, with the exception of a temporary dip due to exogenous factors like the deposit insurance bailout, is projected to lead to higher budget deficits. Indeed, the White House's own budget numbers show the budget deficit climbing in eight of the next ten years, reaching nearly $300 billion.[2] The Congressional Budget Office, meanwhile, projects deficits will climb even faster, nudging the $400 billion mark within ten years.[3]

This pattern of failure -- higher taxes followed by slower growth and higher deficits -- has triggered renewed interest in tax cuts as a key component of any plan to rejuvenate economic growth and control the size of government. That means the new Congress should abruptly change the direction of tax policy and take the first steps toward a radical overhaul of the tax code. Specifically, the new Congress should:

Eliminate the tax code's anti-savings, anti-investment bias.

The biggest economic problem with today's tax code is the over taxation of savings and investment. Simply stated, economic growth and rising wages are impossible if workers are not given better tools, machinery, equipment, and technology. Furthermore, growth is also greatly inhibited if entrepreneurs are penalized by the tax code and hence discouraged from taking risks. Unfortunately, the tax code is biased against capital formation. Unlike many of America's trading partners, the U.S. government taxes capital gains, double-taxes dividend income, taxes interest income, and imposes a tax penalty on business investment. To make matters worse, heavy increases in marginal income tax rates in recent years have reduced incentives to work, save, and invest.

These anti-growth elements of the current tax code should be addressed by comprehensive legislation. The Armey flat tax and the Nunn-Domenici flat tax are both designed to improve many, if not all, of the provisions of the tax code that cause a bias against savings and investment. Alternatively, lawmakers could consider specific bills to address each of these problems. These targeted measures would include capital gains tax relief, both by rate reductions and by indexation to protect citizens from inflation. Lawmakers also should consider "neutral capital cost recovery" measures that would index business depreciation schedules (for inflation and for the time value of money) to alleviate the tax penalty against business investment. The restoration and expansion of IRAs would also help relieve the bias against savings and investment and thus would be a step toward the goal of an expenditure tax. Under such a tax system, taxes on all income that is saved are deferred until the money is spent, ending the double taxation of income that comes from savings.

Simplify the tax code.

Another major shortcoming of the current tax code is its mind-numbing complexity. One of the reasons flat tax proposals are so popular with Americans is their simplicity. Scrapping the current tax code, with its maze of credits, deductions, penalties, and exemptions, and replacing it with a simple flat tax on all income beyond a family allowance has tremendous appeal to economists and ordinary Americans. Moreover, a simple tax code that allows all taxpayers, from single middle-income workers to large corporations, to use a post-card-sized tax return would free up billions of dollars of resources that are now spent complying with the current tax code.

Reduce taxes on families with children.

Families with children have faced large tax increases since World War II because the value of the personal exemption has been eroded by inflation. Proposals for family tax relief, such as granting tax credits for each child, should be key components of any tax cutting package.[4] Because a tax credit does not alter marginal tax rates, there is no increase in incentives to work, save, or invest. But the argument for this proposal is based on reducing the tax burden on families, a burden which has triggered self-defeating calls by overtaxed families for more government services. Cutting their tax burden would make it easier to control spending and help restore the financial independence of American families. Thus, while family tax relief would have positive economic results, the main reason for it is not any direct stimulation of economic growth.

Institute a supermajority requirement to raise taxes.

Congress has imposed rules which require a supermajority to cut taxes, but taxes can be raised by a simple majority. This glaring inequity should be corrected by imposing at least a 60 percent supermajority requirement to approve legislation increasing the tax burden.[5] This reform will be especially important if a balanced budget amendment is approved, since this will lead some politicians to argue that they have no choice but to raise taxes.

Require honest budget estimates.

Remarkably, the revenue estimates used by Congress ignore the economic impact of changes in tax law. This is because they do not consider the incentive effects of tax rate changes. Instead, they calculate tax revenues on a "static" basis. Official forecasters do this even though history and economic theory show that higher taxes will slow economic growth and therefore will never raise as much money as suggested by static models (which assume that overall levels of work, saving, and investment remain unchanged after a tax rate change). Congress continues to rely on these static models. Similarly, history demonstrates that tax cuts spur additional growth. This additional growth expands the tax base and results in additional tax revenue. Whether the revenue gain from this feedback effect is sufficient to offset the revenue losses caused by the tax cut depends on the specific case. In any case, Congress should use revenue estimates that account for the economic impact of proposed tax changes. It should require the Congressional Budget Office and the Joint Committee on Taxation to base their estimates on more accurate dynamic models of the economy.

In addition to taking these positive actions, conservatives in the 104th Congress should work to ensure that Congress avoids several pitfalls. Among them:

- **Avoid "zero-sum" tax reform.** Broad tax reform measures have attracted considerable attention. Lawmakers should understand, however, that the economic impact and political viability of these reforms will be limited if supporters insist on "revenue neutrality." This is especially true if Congress continues to rely on static revenue estimates. This kind of self-imposed restraint ensures that broad-based tax reform has both winners and losers, with the losers having an understandable incentive to fight the proposal.

- **Beware of means testing.** Restricting government benefits on the basis of income has considerable appeal, but Members should understand that this is usually a backdoor way of taxing people. Simply stated, any system that phases out benefits as income rises has the same economic impact as an increase in marginal tax rates.

- **Resist income-capped tax cuts.** House Republicans last year unwittingly proposed and voted for increased marginal tax rates. This happened when they included in their budget proposal a provision for granting a $500-per-child tax credit only to those Americans making less than $200,000 per year. If enacted, this provision would have raised marginal tax rates on additional increments of income for those moving through this income range. This income limitation turned the family tax credit provision into one that would marginally have hurt the economy.

The current tax system is an albatross around the neck of the U.S. economy. Large tax increases under Presidents Bush and Clinton have placed America on a slower-growth path that is costing workers jobs, reducing living standards, and harming international competitiveness. Tax cuts and reforms thus are a necessary and long-overdue component of any plan to restore growth by reducing the burden of government.

Footnotes:

1. Congressional Budget Office, *The Economic and Budget Outlook*, January 1989.
2. Draft Memorandum from Alice M. Rivlen, October 3, 1994, "Subject: Big Choices."
3. Congressional Budget Office, *The Economic and Budget Outlook*, January 1989.
4. See Robert Rector, "Reducing the Crushing Tax Burden on America's Families," Heritage Foundation *Backgrounder* No. 981, March 7, 1994.
5. Daniel J. Mitchell, "The McCain/Saxton Proposal: A Supermajority Antidote to Washington's Pro-Tax Virus," Heritage Foundation *Issue Bulletin*, No. 165, June 19, 1991

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Welfare

Lawmakers of both parties, as well as White House officials, maintain that there must be radical reform of the welfare system because that system has failed. What will separate lawmakers in 1995 is whether they support real reform, in line with the evidence and in line with the views of ordinary Americans, or an expansion of welfare programs masked as an end to welfare.

Real welfare reform must accomplish three objectives.

1. Reforms must reduce illegitimacy. The collapse of the family and rise of illegitimacy is the number one social and economic problem facing America. Family disintegration is the primary underlying factor driving a whole range of other social problems, including crime, poverty, welfare dependence, drug use, and school failure. Because the policies needed to stem the growth of illegitimacy are controversial, some politicians will be tempted to avoid decisive action and try to limit the welfare reform debate to simple workfare schemes. This would be a great mistake. Reducing illegitimacy, not making a growing number of unmarried mothers work, must be the real goal of welfare reform. A future welfare system in which half of all children are born out of wedlock while their mothers are placed in government make-work jobs and their children are raised in government daycare centers will be *more expensive* than the current welfare system and will not stem the other crucial problems arising from family collapse. Any welfare "reform" which does not dramatically reduce the out-of-wedlock birth rate will be a failure.

2. Reforms must control welfare costs. The federal government operates over 75 means-tested welfare programs providing cash, food, housing, medical care, training, and social services to low-income Americans. Federal and state spending on these programs reached a staggering $324 billion in 1993, or over five percent of gross domestic product (GDP). Even worse, without any changes in law, spending on these programs will rise to over $500 billion annually by 1998. In that year, the U.S. will spend two dollars on welfare for each dollar it spends on national defense.

3. Reforms must institute real and sensible work requirements. Over 85 percent of Americans believe that welfare recipients should be required to work for the benefits they receive. But requiring work is far less important than the first two goals of stopping family collapse and controlling future welfare costs. Moreover, workfare schemes can easily degenerate into massive boondoggles which expand rather than contract the welfare state. However, with those caveats in mind, workfare can play an effective, if limited role in overall reform -- but only if it is properly designed.

The only federal legislation introduced so far that seriously addresses the three goals of welfare reform is the Welfare Reform Act of 1994 (S. 2134/H.R. 4566), introduced in 1994 by Senator Lauch Faircloth (R-NC) and Representative James Talent (R-MO). Conservatives in 1995 should press for welfare reforms similar to those in the Faircloth-Talent bill. Specifically, the reforms should:

Reduce illegitimacy by ending certain welfare payments and transferring the funds to the states.

Under current law, having a child out of wedlock is actually subsidized by the federal government. The federal government should never have been in the business of saying, in effect, to an 18-year-old girl: "If, and only if, you have a child out of wedlock, we will send you a check in the mail." The Faircloth-Talent bill would get the federal government out of the business of subsidizing illegitimacy, but not through a simplistic cold-turkey approach. Instead, it shifts money into new programs to care for future illegitimate children, leading to a higher quality of life for those children without retaining the incentives which induce out-of-wedlock births in the first place.

The bill eliminates conventional welfare for young women who, in the future, have children out of wedlock. Starting one year after enactment, federal AFDC, food stamps, and housing aid would be eliminated for women under age 21 who prospectively give birth out of wedlock.[1] The federal funds which ordinarily would have gone directly to these unmarried women would instead be given to state governments, and the states would be prohibited from using these funds for conventional welfare payments. Instead, states could use the funds for a wide variety of alternative programs designed to discourage illegitimate births and to care for the remaining children born out of wedlock. Funds could be used for such things as promoting adoption, closely supervised group homes caring for unmarried mothers and their children, pregnancy prevention programs (excluding abortion) or any other program devised by the state to cope with the crisis of illegitimacy.

Control welfare costs by placing a cap on the growth of total federal welfare spending.

The federal government operates over 75 overlapping welfare programs. Together with state spending, American taxpayers spend well over $300 billion on these programs, and the cost is projected to top $500 billion by 1998. Conservatives should urge Congress to place a cap on future federal spending on means-tested welfare programs. The Faircloth-Talent bill would cap the future growth of aggregate federal spending on these welfare programs (excluding Medicaid) at 3.5 percent per annum. This cap on aggregate welfare spending would save the federal government more than $70 billion over the next five years.

Give states the widest possible authority to redesign the welfare system.

Under the cap, federal welfare funds should be given to each state government as a block grant. The state would be required to use the fund to aid low-income persons but would be given broad authority to set eligibility standards for all welfare programs. States also would be given authority to shift funds between programs (today they have only limited authority if granted a federal waiver). For example, a state should be able to use housing funds for job training or vice versa, according to state priorities. Similarly, states should be able to use the funds to operate new welfare programs of their own design. For example,if a state wished, it might operate one food program of its own design in lieu of 10 separate federal programs.

Institute serious but sensible workfare.

The Faircloth-Talent bill would impose work requirements on more welfare recipients than any alternative legislation. However, the Faircloth-Talent bill is unique in emphasizing work requirements for the most employable welfare recipients (such as those with school-age children), rather than the least employable (such as those with infant children). It makes far more sense, as conservatives maintain, to begin workfare requirements with those welfare recipients who face the fewest family obstacles to joining the workforce. It makes little sense, by contrast, to focus first on the beneficiaries who would require day care and other expensive services before they could reasonably be expected to work. Experience has shown that many of the more employable individuals now on welfare do not need welfare at all and quickly leave the rolls if made to work for their benefits. Because of its efficient targeting, the cost of operating work programs would be far lower in the Faircloth-Talent bill than in alternatives.

Under the bill, the following categories of individuals would be required to perform workfare (community service in exchange for benefits received):

- **All absent fathers with children receiving AFDC who consistently fail to pay child support obligations;**
- **One parent in all two-parent families on AFDC;**
- **All single, able-bodied, non-elderly recipients of food stamps;**
- **Half of all single mothers in the AFDC program.**

The bill recognizes that, because of high daycare costs, work requirements on single mothers with younger children will actually increase, rather than decrease, welfare costs. Consequently, the Faircloth-Talent bill focuses its work requirements for single mothers on those who have older children. Half of all AFDC mothers do not have any children under age 5.[2]

The Republican "Contract With America." The Contract with America announced by House Republicans contains a welfare proposal with provisions similar to Faircloth-Talent but weaker. Among differences between the Faircloth-Talent bill and the Contract:

- **The Contract proposal includes fewer welfare programs under its spending caps and produces about half the savings of the Faircloth-Talent bill.**
- **Unlike the Faircloth-Talent bill, the Contract proposal has no work requirements for fathers who fail to pay child support.** It requires fewer AFDC mothers to work and does not focus its work requirements on the mothers with older children. The work provisions of the Contract bill have the potential to devolve into an expensive boondoggle. For example, the bill authorizes $6,000 in new federal funding each year for every single mother placed in a work program.
- **The provisions in the Contract bill to reduce illegitimacy are very weak.** The bill eliminates welfare benefits for women under age 18 who have children out of wedlock in the future. Because of its lower age cut-off (18 as opposed to 26 under the Faircloth-Talent bill), the Contract bill will eliminate welfare for only 13 percent of future illegitimate births compared to about 75 percent under Faircloth-Talent.

The Clinton Administration is likely to push for merely cosmetic reforms in 1995: legislation that is long on rhetoric and short on real reform. This would enable the Clinton White House to grandstand on the issue and claim that the President delivered on his highly public promise to "end welfare as we know it." Conservatives should unmask Clinton's false claims on workfare and "time limits" -- and focus the taxpayers' attention on the more important issues of welfare costs and the illegitimacy crisis.

Congress grapples with welfare infrequently. The passage of sham or limited reforms in 1995 or 1996 would be a tragic mistake and could block efforts for real reform for half a decade or longer. The national debate on welfare is shifting steadily to the right; thus, time is on the conservative side. The more thorough the debate becomes, particularly on the key issue of illegitimacy, the better the prospects for genuine, conservative reform. Under no circumstances should conservatives participate in yet another fruitless exercise in sham welfare reform merely to "pass a bill." At best, that would be just another inconsequential piece of legislation condemning millions more Americans to welfare dependency; at worst, it would make a bad situation even worse. Since the Clinton Administration and liberals in Congress are unlikely to pass serious reform, the ideal course for conservatives is to demand an intense and thorough debate before passing legislation, thereby focusing public attention on the key issues and greatly improving the prospects for real welfare reform.

Footnotes:

1. Young women who had illegitimate children prior to the cutoff date would not have their benefits eliminated, but would be subject to the work requirements discussed below. Four years after enactment, the cutoff age would be raised to 26.

2. However, the bill has provisions which prevent a welfare mother from giving birth to additional children as a means of avoiding work obligations. If a mother had additional children after enrolliing in AFDC, they would not qualify her for exemption or lower priority in work programs.

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Labor & Employment

In 1995, Congress is expected to change course dramatically in its consideration of labor issues. In the past, the Democratic-controlled Labor Committees focused predominantly on organized labor's top agenda items, such as striker replacement and plant-closing legislation or hiking the minimum wage. Given the make-up of the new Congress, conservatives have a historic opportunity to shift the focus of debate to a number of issues that the previous majority would never allow to be considered. High on the list for review should be restrictive labor laws enacted in the 1930s that do not address the needs of today's workplace. In addition, Congress should use its oversight power to review recently enacted civil rights laws and the Administration's regulatory agenda.

Conservatives should work to achieve reforms that would:

Repeal the prevailing wage laws.

The Davis-Bacon (1931), Walsh-Healy (1936), and Service Contract (1965) Acts require the government to pay union-scale wages on federally financed construction sites and with regard to contracts for equipment and services. These laws make it virtually impossible for low-skilled workers, especially minorities and young people, to be hired on government jobs because their productivity cannot justify the mandated wages. Besides their inherent unfairness, these laws cost taxpayers dearly. The Congressional Budget Office estimated in 1993 that repealing the Davis-Bacon Act alone would save the federal government close to $3.3 billion over five years. Repealing the Service Contract Act would save at least another $1 billion over a five-year period.

Implement the *Beck* decision.

The Supreme Court decided in a 1988 case, *Communications Workers of America v. Harry Beck*, that Beck, a non-union member working for the Bell telephone system, was not required to pay fees to the union under its contract with AT&T. Beck objected to the union's using his fees to pay for political activities instead of job-related collective-bargaining issues. The Supreme Court correctly decided that American workers should not be forced against their will to give money to finance political candidates. The Bush Administration issued an executive order implementing the decision, but in one of his first actions in office, President Clinton rescinded it. Legislation is needed not only to codify the Beck decision, but also to require unions to disclose how much of their members' dues are spent on political activities.

Institute a freeze on existing rulemaking efforts and conduct hearings on the most controversial White House proposals.

The Labor Department's semiannual regulatory agenda lists 21 rulemaking proposals which the Clinton Administration intends to implement in the next year and which are expected to have "significant" impact, or to cost the economy more than $100 million annually. Among these rules are two OSHA rulemakings already underway that would regulate indoor air quality and repetitive motion injuries. If implemented, these are expected to cost the economy billions of dollars annually. Other Labor Department rulemaking proposals affect child labor rules, the Fair Labor Standards Act, and the Service Contract and Davis-Bacon Acts.

In reviewing these regulatory proposals, Congress should require the Labor Department to justify the cost-benefit analysis and risk assessments prepared for the rules and rank them in order of priority. In addition, the Department should be required to offset the costs of proposed rules by repealing other rules that are no longer needed or that address lesser priorities. As mentioned earlier, the Davis-Bacon and Service Contract Acts should be repealed and all rulemaking frozen.

Conduct oversight hearings over the next two years that examine all aspect of the Occupational and Mine Safety Acts, Fair Labor Standards Acts, recently enacted civil rights laws, and child labor rules.

Congress should consider first the OSHA and FLSA statutes and the recently enacted civil rights laws. Among the many issues that could be considered:

- **In examining these statutes,** lawmakers should pay close attention to inconsistencies with regard to such questions as coverage thresholds, penalties, statutes of limitations, and posting requirements, among others, so that business can expect some degree of consistency in the different laws.
- **With regard to OSHA,** Congress should examine agency rulemaking, enforcement, and compliance assistance programs. Too often, proper risk assessments and cost-benefit analyses are not conducted on the agency's rulemaking proposals. And the agency spends too much time and money on enforcement rather than on its successful and underfunded voluntary protection and on-site consultation programs, which take a more cooperative approach to providing a safe workplace.
- **The Fair Labor Standards Act,** which was enacted in 1938, has not kept pace with today's workplaces. Among the issues that should be addressed are amending the law to allow flexible time schedules and private sector compensatory time in lieu of overtime wages and restoring the small business exemption from FLSA coverage.
- **The 1990 Americans With Disabilities Act and the Civil Rights Act of 1991** have had an enormous impact on the workplace, affecting how an employer, hires, fires, and treats workers on the job. The litigation generated by these laws is shown by the substantial backlog of cases at the Equal Employment Opportunity Commission and the number of court cases that are determining what the laws mean for

employers. Congress should review the implementation of these acts to see whether the original intent in each case is being carried out.

Ultimately the well-being of the American worker depends upon the economy's ability to crate jobs. U.S. companies cannot compete in a global economy under the current patchwork of labor regulations and laws. Congress should not miss this excellent opportunity to conduct a thorough review of these issues and to throw out those laws and regulations that are no longer needed.

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Text: Excerpts from Heritage Foundation Briefing Book for New Members

Environment

~~Proposed risk~~ assessment amendments opposed by the majority leadership in both the House and Senate also helped to kill consideration of Clean Water Act and Superfund reauthorizations, as well as pesticide reform, although there were some other factors in those issues. Further, a risk assessment amendment a\was added tot he Safe Drinking Water Act reauthorization bill, effectively blocking consideration of the bill in the House.

While the same issues that confronted environmentalists in the 103rd Congress will reappear in the 104th, the ability of environmentalists to resist bipartisan initiatives will be eroded because of the change in party control. Thus, the environmentalists are likely to attempt a three-pronged strategy, foreshadowed during the last Congress, to minimize their vulnerability while capitalizing on their strengths. Conservatives must thwart these efforts and instead press for legislation to advance the "unholy trinity" issues.

The first element of the environmentalist strategy likely will be to limit debate to relatively few pieces of legislation on the 104th Congress and use new tactics to gut conservative amendments to bills that are brought up. The two reauthorization bills most likely to be pushed by the Administration are the Safe Drinking Water Act and Superfund. Other possible major battlegrounds include the Clean Water Act and Endangered Species Act reauthorizations--bills that could be used to open the door to greater protection of private property rights.

In addition, while the Clinton Administration has signaled its willingness to be flexible on risk assessment reform, the White House and its allies likely will try to counter the threat of more conservative risk assessment reform by trying to push legislation similar to Representative Herbert Klein's (D-NJ) measure, introduced last session, that effectively gutted the substantive provisions of other risk assessment bills. By enacting a hollow risk assessment bill, they possibly could block further bills on the grounds that the legislative "need" for reform had already met. Conservatives should vigorously oppose this strategy of watering down property rights and risk assessment measures for the same reason the environmentalists devised it-- it would end the chance of real reform.

Second, in its attempts to further the environmental lobby's agenda and thwart conservative reforms, the Administration likely will rely increasingly on executive orders, departmental policy directives, and rule-making to pursue its real agenda. For instance, EPA Administrator Carol Browner already has announced she intends to pursue administratively Clinton's Superfund "reform" proposals that Congress failed to enact last session. Attempts such as this to usurp congressional authority in order to avoid reform proposals should be blocked.

Third, environmentalists and the Clinton Administration likely will look increasingly toward international agreements to further their agenda, as they sought to do through side agreements to the North American Free Trade Agreement and the General agreement on Tariffs and Trade (GATT). The White House probably will also urge the Senate to ratify some treaties that are not even written yet, such as the Biodiversity Treaty.3 On principle, the Senate should refuse to consider any such unwritten treaty.

Although the issues pushed in treaty negotiations will vary according to the specific international agreement, the environmentalists are working hard to incorporate the idea that regulation of the environment is a legitimate purpose of international economic agreements.

To fix the fatal flaws in the legal framework of the nation's environmental policies, and to advance "unholy trinity" objectives, conservatives in Congress should push for legislation to:

Require agencies to compensate property owners for their lost value whenever their property rights are infringed or restricted.

This is a simple fairness issue. If regulations that restrict property owners' right to use their land are truly for the public good, the public should pay for them and not some hapless landowner. This is also a populist issue. The vast majority of victims of government seizure of property though regulation fare ordinary Americans. And this is an issue involving the philosophy of the nation. The Founding Fathers well understood that citizens are helpless against encroachments on freedom if their property is insecure.

The strongest proposal so far introduced to protect property rights was by Senator Phil Gramm (R-TX). This measure, introduced in 1994, would require payments to property owners for their lost value whenever the government infringed their rights unless the infringements was found to be of negligible value. The next strongest proposal was introduced by Representative Dick Armey (R-TX), who is committed to offering an even stronger bill in the 104th Congress.

Transfer substantial control of public lands to states.

The federal government owns four out of every ten acres of land in America, but has proved to be an abysmal steward of those lands. Local ecologies and economies have suffered under its "one-size-fits-all" and bureaucratic approach to land management. Hardest hit have been the western states, where typically the federal government owns more land than the states, localities, and private citizens combined. The power over these lands should be returned to the state governments, which are intimate with the environmental and economic concerns unique to their part of the country. In this way, those most affected would have the greatest voice.

Require risk assessments to prioritize environmental problems.

Federal agencies should be required to perform risk assessments before regulating or banning products to promote the health and safety of people or the environment unless the threat is immediate. Moreover, they should conduct risk assessments of existing regulations so that those involving negligible risks do not remain on the books. Risk assessment is too powerful an informational tool to ignore when regulating. The first step in correcting this problem is to require agencies to conduct consistent, replicable risk studies according to accepted scientific standards so that risks can be prioritized.

Require that all the costs of regulating risks be quantified using cost-benefit analysis.

The Office of Information and Regulatory Affairs within the Office of Management and Budget should perform cost-benefit analyses of proposed regulations that recognize the foregone benefits of alternative actions. To the extent possible, these "opportunity costs" should be factored into the equation because money spent on the regulation could not be spent elsewhere, and other competing beneficial policies could not be implemented. Since the benefit side of cost-benefit equations typically relies on "soft" and malleable figures, it is necessary to turn the analyses over to highly qualified government officials who also are disinterested in the final outcome of the study. Only after the net cost is determined should that cost be compared with the benefit of the potential lives saved.

Require the executive branch to submit periodically to Congress a priority list of which regulations save the most lives for every dollar spent.

The net cost of regulations under cost-benefit analysis should be divided by the number of lives saved, as well as by the level of risk to the average American. This figure would represent the number of lives saved for revery dollar spent. This benchmark figure would provide an important tool to Congress in setting policy and monitoring rules. As part of this report, agencies should be directed to intermix common everyday risks, such as death by lightning, so that legislators and the public have a framework idea of the magnitude of the risks that are regulated.

Require agencies to compare proposed regulations against the priority list.

Congress should require that proposed regulations be compared against the priority list. Whenever an agency proposes to take an action that ranks lower on the priority list than another, it should justify in detail the decision to spend society's economic resources on a regulation that, in effect, would save fewer lives or increase net costs more than other uses of those resources. In this way, America can achieve the highest benefits at the least cost.

End retroactive liability and joint and several liability.

If the Superfund legislation is brought up for reauthorization, conservatives should press for the elimination of retroactive liability. Today, owners of land are held liable for pollution they inherited at waste sites. This unfairly places the cost of past actions in the hands of innocent individuals and companies. By the same token, conservatives should press to eliminate joint and several liability. Today, individuals are liable to pay for multi-million-dollar cleanups of sites to which they contributed only a tiny fraction--such as dumping a few auto batteries.

If the United States is to remain competitive in the world marketplace, its unnecessarily expensive, ineffective, and unfair environmental laws must be reformed or repealed. It is not simply a matter of improving the economy. It is also a matter of improving the average American's overall quality of life. By squandering resources on relatively unimportant environmental problems, the nation wastes money, lives, and the benefits of real environmental improvements. Moreover, it is a matter of justice and fairness. If a regulatory taking of a person's property is truly for the public good, then the public should pay for it.

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3 This happened late in the 103rd Congress regarding the Biodiversity Treaty when the Senate came very close to voting on ratification of an unwritten treaty.

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Health Care

Health care played only a small role during the election, and there probably will be little enthusiasm for a debate over sweeping reforms in 1995. Nevertheless, it is likely there will be pressure, from many Democrats and from some Republicans, for an enactment of a "first step" or "incremental" bill that includes those measures on which there is said to be broad agreement. Liberal Democrats will see this approach as laying the foundations for sweeping reform in the future. Conservatives should demand to know what is the ultimate destination of any "first step" to health care reform. If it gives government greater control over the health care of Americans, any modest or incremental action should be rejected. Instead, conservatives should advance proposals that will take the health system in a very different direction, giving Americans greater control over the design of their personal health care benefits and greater control over how much is spent on their health care and who in the health system receives that money.

The Mainstream Group proposal may reemerge in the Senate as such an incremental bill, as might the bipartisan Rowland-Bilirakis bill in the House. Liberal Democrats likely will push the so-called KidCare proposal, advanced in 1994 by Senator Tom Harkin (D-IA). this would establish much of the infrastructure of the Clinton plan (e.g., alliances, a standard benefit package, and a new subsidy program) but only for children. It is not clear whether this will have full liberal backing, however. Even Representative Jim McDermott, who supports a Canadian system, doubts the soundness of KidCare. According to McDermott, "[K]idCare has a rhetorical attractiveness but would be a practical nightmare precisely because of its reliance on government bureaucracy."[1] Conservatives should oppose all such fragments of the rejected Clinton health plan.

New legislators, and even many returning Members, probably will find themselves overwhelmed by the technical jargon of the health care debate on Capitol Hill. Terms such as "community rating," "adverse selection," "risk pools," "purchasing cooperatives," "portability," and the like are indeed confusing and make it difficult for lawmakers to understand the real underlying issues at stake. However, at the heart of the health care reform debate are two fundamental questions that every Member should keep firmly in mind:

First: In any reform, *who* is going to make the key decsion over health plans, benefit levels, services, and choice of doctors? Either it will be the federal government and government-sponsored agencies, or it will be constituents. Conservatives should support reforms that give more direct control to families.

Second: In any reform, *who* is going to control the amount of money that is spent on health care? Again, either it will be the federal government and government-controlled agencies, or it will be constituents. Again, conservatives should support reforms that give more direct control to families.

This means conservatives should:

Reject any incremental step that would lead to an increase of government—or even employer—control over the health care of families.

The plans espoused in 1994 by the Clinton Administration and liberals in Congress answered both questions with the same answer: the system will be controlled, managed, and run by government agencies. Many of the incremental measures put forward in 1995 will share the same view and therefore should be unacceptable to conservatives. In addition, conservatives should vehemently oppose legislation that, in the guise of promoting federalism and state experimentation, actually would facilitate a government takeover of the design and control of existing private plans. Legislation of this kind likely to be proposed in 1995 includes changes in the ERISA statute (which, among other things, regulates self-insured health plans). These changes, if enacted, would permit state governments to impose new mandates on companies now running their own plans.

In rejecting these incremental steps, Congress also should go no further down the road of imposing even tighter price controls in the Medicare system. Price controls do not work, which is why Medicare continues to surge despite ever-increasing regulation and cost-shifting to private plans. When faced with votes on the Medicare budget, conservatives should demand reforms that will introduce more consumer choice in the system as the way to control costs (see below).

On the other hand, conservatives should pursue incremental steps, while developing more substantial legislation, to deal with a fundamental design flaw in the current system that leads to anxieties among families about long-term security of benefits and access to chosen physicians. The flaw: because the tax code excludes company-sponsored and company-owned health benefits from an employee's taxable income but allows virtually no tax break for health care acquired in any other way, working Americans are effectively forced to cede control of health care to their employers. If they do not, they face a huge tax penalty. This perverse tax penalty means families are denied the security of ownership and control and are subject to arbitrary cost-cutting measures instituted by their employers. Further, because the tax code favors insurance over direct payments, families and physicians face needless insurance paperwork and "third party" payments that help drive up costs.

Comprehensive legislation to deal with this flaw was introduced in 1994 by Senator Don Nickles (R-OK) and Representative Cliff Stearns (R-FL). The Consumer Choice Health Security Act (S. 1743/H.R. 4550) would, among other reforms, replace the current tax exclusions and deductions with a new refundable tax credit for insurance, out-of-pocket expenses, and contributions to a Medical Savings (Medisave) Account. In addition to considering such comprehensive legislation, conservatives can support more limited measures that would begin to increase family control and choice of benefits. Among the steps Congress could take in 1995:

Restore the tax deduction for health insurance purchased by the self-employed and provide similar tax relief to families without coverage today who buy their own coverage.

Giving families effective control over their health care means removing the tax penalties against non-employment-based plans.

Open the Federal Employee Health Benefits Program (FEHBP), which covers Members of Congress and federal workers, to other Americans.

The FEHBP, which covers almost 10 million Americans, is the largest health system which allows families to choose and own their health plan no matter where they work. Congress should open up this system to other groups of Americans, such as military families and those without employment-based coverage.

Introduce Medisave Accounts from which payments can be made directly for medical services or for personalized insurance.

One way to begin to do this would be to ease the rules governing the tax-free flexible spending accounts currently offered by many employers. Specifically, Congress should allow employees to roll over unused balances from year to year and to continue their accounts as personal health savings plans if they leave their current places of employment.

Allow families the same tax exclusion for insurance obtained through such organizations as unions and churches as they have today only for employer-sponsored plans.

Many unions, churches, state farm bureaus, and other organizations run health plans today. But in most instances ordinary Americans receive no tax break for joining such non-employment-based plans. This tax unfairness should be ended so that Americans can choose what organization they prefer to sponsor their health care.

Introduce a new Medicare voucher.

Under this option, new retirees could choose to accept a Medicare voucher to help offset the cost of private insurance and medical payments instead of joining the traditional government-reimbursement Medicare program. After an initial period to assess demand for such a voucher, the option could be extended to all retirees.

Many returning and newly elected Members of Congress may assume that health care is off the congressional agenda. While sweeping reform of the scale envisioned by President Clinton is unlikely, even the supposedly modest incremental bills discussed briefly at the end of the 103rd Congress would mean major changes in today's system. Moreover, as Congress considers the Medicare budget and other health programs, even small changes will push the system in a certain direction. It is crucial, therefore, that conservatives keep their attention focused on the basic issues in health care and take small steps only after contemplating where these steps ultimately will lead.

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1 Quoted in the *Washington Times*, September 13, 1994.

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Telecommunications

The new Congress must move swiftly to deregulate telecommunications. Each day that sharper competition is delayed, consumers are made to pay the price. A study by the WEFA Group, an economic forecasting firm in Burlington, Massachusetts, finds that if all telecommunications regulations were removed, the economy would grow, on average, by 3.3 percent per year, compared with only 2.9 percent without complete deregulation.1 The study estimates that consumers would enjoy savings of approximately $63 billion a year with deregulation.2 Exports of high-tech telecom products also could increase greatly if the Baby Bells were permitted to manufacture equipment. It is vital, therefore, that the new Congress craft a deregulatory reform package that avoids the many flaws that doomed last year's bills.

In 1995, telecommunications will again be a hotly debated issue. Incoming Majority Leader Robert Dole already has signaled that telecommunications reform will be one of the first legislative items taken up by the Senate. Although it is unclear how legislation will proceed in the House, action in that chamber is likely to begin with the re-introduction of last year's bill. The versions of deregualtory legislation that will emerge from House and Senate committees in 1995, however, most likely will be markedly different from those considered in 1994 since Republicans will wield more power.

Lawmakers must expect to confront the same industry-based politics of telecommunications deregulation as Congress faced last year. Baby Bell, long-distance, and cable companies will again face off over the question of how soon one industry should enter another's markets. Debates also will rage on the nature and extent of "universal service" -- that is, do consumers have a right to all the information and educational services on the market, and who should pay for them if they do? Currently, more profitable segments of the industry subsidize more costly services. This leads to inefficient cost-shifting between industry carriers, and some consumers have to pay artificially high prices to provide below-cost services to other consumers. "Domestic content" requirements will also be a sticking point. Last year's bills contained "domestic content" clauses explicitly requiring Babe Bells to manufacture all equipment within the United States and purchase all their components from domestic firms as well.

If America is to remain a global leader in telecommunication, Congress must steadfastly oppose any attempt to slow the advance of competition in this industry. Last session's bills effectively treated this important industry as a fixed pie to be divided among existing players, with each getting a particular slice. But with technological innovation and restructuring rapidly taking place, the regulated monopoly model on which current law is based is outmoded and -- worse still -- is holding back a leading U.S. industry. In order to avoid this outdated view of the market, legislation in 1995 should remove all barriers to competition and innovation without erecting new rules that attempt to determine how the market should look in the future. To accomplish this goal, Congress must implement a three-step reform package:

Eliminate all federal telecommunications entitlements.

Currently, regulators require that billions of dollars in subsidies be transferred from one industry segment to another in an attempt to extend telephone service universally at artificially low prices. Such consumer entitlements effectively destroy competition, hurting consumers in the long run, since carriers receiving such subsidies are given an unfair advantage over potential new entrants. In addition, it is unclear whether these subsidies actually help bring service to truly needy Americans. In many cases, extra costs are imposed on low-income inner-city families to subsidize service to rural middle-class residents. Moreover, subsidies generally are not needed to extend service. Just as television programming has been extended to nearly every American home without government pricing mandates -- including to 91% of poor households3 -- telephone service would be provided even in the absence of federal requirements and subsidies.

While these subsidies have extended service to many Americans, it has come at a very high cost. One recent study found that the telephone industry loses between $1.5 billion to $10 billion per year from questionable attempts to provide universal service in this manner.4 Hence, the down side of such an inefficient subsidization policy is the elimination of any potential competition in local markets that could offer consumers a greater range of options. To remedy this, all federal telecommunications entitlements must be abolished. Any remaining assistance needed to ensure that poor Americans and those living in remote areas receive basic telephone service can and should be carried out at the state or local level. Such assistance should be provided directly to individuals, not to carriers who use these subsidies to help insulate themselves from competition.

Repeal all federal barriers to telecommunications competition.

There is no justification for entry barriers in the telecommunications market. Therefore, all laws governing entry should be abolished. The Modification of Final Judgment,5 the cable-telco ban, state barriers to competition, protectionist investment rules, cable and telephone rate regulation, radio spectrum management, and restrictions on mergers and alliances all should be removed from the statute books.

Establish a federal "open access" policy.

Finally, to ensure that the telecommunications industry makes the transition from a regulated monopoly to a competitive marketplace, Congress should enact an open access policy that guarantees every carrier access to every other carrier's network. This policy would make sure providers can offer service to all consumers while simultaneously making the market much more competitive. It also would help alleviate the need for any other form of federal regulation. Assuring open access would be the only task remaining for the FCC.

If these steps are taken, telecommunications freedom will be guaranteed, competition in this traditionally monopolistic industry will become a reality, and consumers will reap the rewards in the form of greater service options and lower prices. Senator Dole's 1994 draft proposal would achieve most of these goals. Specifically, it would have rapidly eliminated entry barriers, streamlined the subsidization process, and required carriers to enter into good-faith interconnection agreements to guarantee open access.6 That proposal would constitute a good starting point for deregulation in the new session.

Legislators should realize that other industries and their customers care deeply about how the telecommunications industry is deregulated. For example, the computer industry will play an important part in the construction of the "information superhighway" in upcoming years. That industry's ability to grow will depend heavily on telecommunications regulations. But new regulations that were added to last year's legislation would have placed onerous new requirements on information providers. Lawmakers must reject such an approach, pointing out to companion industries how much principled telecom deregulation will help them.

Utility companies also want a free market in telecommunications since they can provide many communications services through their local systems. Electric or gas utility companies could make technological modifications in their existing networks and soon become serious competitors of local telephone companies if Congress allowed them to do so. For example, electric companies could wrap fiber-optic communications wires around aerial cables. Gas companies could feed wires through existing underground ducts once used to send gas or buy new cables within existing rights-of-way. Currently, utilities are restricted form entering other industries under the Public Utilities Holding Company Act of 1935.

Legislators also should not be surprised to learn that organized labor will push hard, as it did last session, for more radical deregulation than many big businesses want. This is because labor groups realize liberalization of this sector will mean more jobs in the future. In fact, the WEFA Group study shows that 3.6 million more jobs will be created by 2003 than would have been expected without deregulation.7

Congress therefore should support an "open access" platform for telecommunications because it would guarantee rapid transition to a competitive marketplace that benefits the industry and consumers alike. The tumultuous technological transformation taking place in this industry makes it impossible for Washington even to try to manage this sector any longer. Just as the computer industry and many other American high-technology industries have become highly competitive without federal micromanagement, intervention, and subsidies, so can the telecommunications industry. Liberalization will mean increased competition, more high-skilled and high-paying jobs, increased exports, and lower consumer prices for a greater variety of services. But Congress must pass principled deregulatory legislation this year for this hope to become a reality.

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1 The WEFA Group, *Economic Impact of Eliminating the Line-of- Business Restrictions on the Bell Companies* (Burlington, MA: The WEFA Group, July 1993).

2 *Ibid.*

3 U.S. Department of Energy, Energy Information Administration, *Housing Characteristics 1990,* May 1992, p. 115.

4 David L. Kaserman and John W. Mayo, "Cross-Subsidies in Telecommunications: Roadblocks on the Road to More Intelligent Telephone Pricing," *Yale Journal on Regulation,* Vol. 11 (Winter 1994), p. 121. Kaserman and May argue these estimates are likely to be too low since "they do not consider the incalculable losses resulting form the distortion of dynamic market incentives to create and adopt technological advances that make more efficient use of the long-distance network."

5 The MFJ is the decree that broke up the telephone system in 1982. It remains a primary obstacle to telecommunications competition since it prohibits the Baby Bells from entering long-distance markets and from manufacturing equipment.

6 See Adam D. Thierer, "Senator Dole's Welcome Proposal for Telecommunications Freedom," Heritage Foundation *Backgrounder Update,* No. 233, August 24, 1994.

7 WEFA Group, *op. cit.*

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Defense and Military Readiness

The question for 1995 will be whether the Administration's budget will be large enough to fund the military force it claims it wants. The Clinton defense program was established by the "Bottom-Up Review" of defense policy, completed in September 1993. The Heritage Foundation estimates that the program is underfunded by around $100 billion for fiscal 1995-1999.[5] One of the most important questions facing the new Congress will be whether to fund these shortfalls. The Administration's request is likely to be consistent with last year's five-year budget proposal, which means the underfunding will continue.

The opening round of this debate in 1995 will occur during consideration of the fiscal 1996-fiscal 2000 Budget Resolution. If Congress is to provide full funding for the Bottom-Up Review program, the Budget Resolution at a minimum will have to provide the following defense budget authority: 1) $274 billion in fiscal 1996; 2) $275 billion in fiscal 1997; 3)$283 billion in fiscal 1998; 4) $290 billion in fiscal 1999; and 5) $299 billion in fiscal 2000. This level is more than $100 billion greater than the amount the Administration is expected to request for the five-year period.

Now that the Republicans control the leadership of the Congress, they can be expected to demand higher levels of defense spending. The GOP Contract With America calls for the creation of a Commission on National Security and Department of Defense Force Structure and Readiness Funding Shortfalls to report on whether current funding levels are adequate. This commission will review military pay raises, funding for missile defense, five-year defense budget short falls, restoration of funding to readiness accounts, and defense policies regarding United Nations peacekeeping duties.

The military disaster in Somali in late 1993, in which forty servicemen were killed, drew attention to other aspects of the Clinton Administration's defense and foreign policies beyond budget issues. Flip-flops regarding nuclear negotiations with North Korea, the on-again, off-again occupation of Haiti, and the absence of a firm policy on the war in Bosnia have contributed to a sense that the Administration lacks focus and direction. To restore American military strength and confidence in U.S. national security policy, Congress must:

Restore funds cut from missile defense.

The ballistic missile threat posed by countries such as Iraq and North Korea should focus attention on the need for America to defend itself and its allies from missile attack. The Clinton Administration claims that it wants to develop and deploy defenses against shorter-range (theater) missiles which endanger U.S. troops stationed overseas. However, it has deferred the decision to deploy defenses against long-range (strategic) missiles which can threaten American territory. In all, it has cut the Pentagon's missile defense budget by over 50 percent from the level proposed by the Bush Administration for fiscal 1995-1999.

The Ballistic Missile Defense program will receive approximately $2.8 billion in fiscal 1995. If Congress wants to restore funding to the level recommended by the Bush Administration for fiscal 1996, which would have provided for research and development of a robust missile defense system, it will have to add some $7.6 billion to current levels.

Adequately fund combat readiness.

The armed forces are now engaged in some fifteen peacekeeping and humanitarian military operations around the world. This is a burden on near-term military readiness which the Clinton Administration has been paying for at the expense of medium and long-term readiness.

Near-term readiness is funded primarily through the defense budget's military personnel and operation and maintenance (O&M) accounts. Medium-term readiness is provided for by purchasing existing weapons and equipment in the procurement accounts, while long-term readiness results from investing in new technology in the research and development accounts. Near-term readiness accounts have been reduced by 17 percent in real terms since 1985. The long-term readiness accounts have dropped by 55 percent.[6] Long-term readiness will continue to suffer if the Clinton Administration's cuts are left unchallenged. Deputy Secretary of Defense John Deutch recently told the armed services to consider delaying or canceling such important modernization programs as the Air Force's F-22 fighter program and the Army's *Comanche* helicopter program.

If Congress wants to restore balance to the Pentagon budget's internal accounts, it will need to raise procurement levels to their traditional 2:1 ration with research and development accounts. This process should start with increasing the general defense budget by more than $100 billion above the Administration's anticipated requests for fiscal 1996-2000 in budget authority during consideration of the budget resolution. These increases should then be applied to the procurement and research and development accounts during the authorization and appropriations processes.

Close excess military bases as soon as possible.

Another issue that will come up in 1995 is the next round of base closures. The services need to eliminate the excess overhead of too many bases. Doing this will achieve long-term savings that can be used to pay for readiness and modernization.

An independent commission, the Base Realignment and Closure Commission (BRAC), is responsible for making recommendations for closing or consolidating bases to the Administration and Congress. The BRAC process already calls for reducing domestic military infrastructure by 15 percent from 1988 levels as measured in replacement value. Ideally, the BRAC's next round should seek a further education of 10 percent, and should accept no less than a 5 percent reduction, from these 1988 levels. The President must accept, and Congress must vote on, the recommendations as a package. This process has worked well in recent years, but there has been talk of deferring the 1995 round of base closures until after the 1996 elections. This would be a mistake; unneeded bases should be identified and closed as quickly as possible.

Pass supplemental funding for unforeseen peacekeeping operations.

The occupation of Haiti by 20,000 troops in September 1994, which could cost as much as $1 billion by the time it ends in early 1996, marks the second consecutive year of substantial U.S. peacekeeping commitments.[7] In March 1994, U.S. forces ended a 16-month humanitarian operation in Somalia which cost well in excess of $1 billion and cost forty Americans their lives.

Most of the cost of these operations is borne by the Defense Department and paid for from the operations and maintenance (O&M) accounts normally used to operate ships and aircraft and train forces for combat. Funds used for peacekeeping thus reduce the resources available for keeping forces at peak readiness; for example, to pay for flying hours for the squadrons supporting no-fly zone enforcement in Bosnia and Iraq, other U.S. squadrons are having their flying time for normal training dramatically cut.

To prevent this degradation of readiness, Congress will have to pass supplemental spending legislation to fund the Haiti operation. To prevent damage to readiness in the future, Congress will have to impose limits on the scope of peacekeeping operations the Administration may accept.

Stop pork-barrel spending on non-defense programs.

The use of Pentagon funds to pay for items and programs unrelated to defense will continue to be a matter of concern for Congress. Between fiscal 1990 and 1993, the General Accounting Office found that $10.4 billion in the defense budget was used to pay for such civilian activities as the World Cup Soccer games, the Summer Olympic games, and the Civilian Community Corps. Spending for such programs went up 238 percent during this period as overall defense spending was falling by almost 20 percent. In 1993 alone, Congress required the Pentagon to spend $4.6 billion on non-defense items -- enough to buy one nuclear aircraft carrier or maintain two additional Army divisions. This was $800 million more than was spent on ballistic missile defense.8

The Congressional Research Service has identified $5.8 billion in the fiscal 1995 defense authorization bill for "items that may not be directly related to traditional military capabilities." When environmental programs are included, this figure rises to more than $11 billion.9 The total fiscal 1995 defense budget, meanwhile, represents a 10 percent real decline in defense spending since fiscal 1993. This $11 billion is more than three times the $3.2 billion increase the Administration requested for the Pentagon from fiscal 1994 levels in fiscal 1995. Since the Administration plans to reduce real defense spending in each year from now through fiscal 1999, spending on non-defense items must be cut or it will become a growing portion of a smaller budget, and both day-to-day military readiness and long-term combat capabilities will suffer.

Pass legislation keeping women out of ground combat and homosexuals out of the military.

The Congress should take a hard look at the Clinton Administration's policies on homosexuals in the military and women in combat. The "Don't Ask, Don't Tell" policy on homosexuals in uniform faces an uncertain future as several cases move through litigation. The Supreme Court may decide the constitutionality of the policy in 1995; although the Court has upheld the military's right to set personnel policy outside of civil rights parameters more than a dozen times, the effect of Clinton's appointees on the Court will only be felt when one of these cases is heard. Both the logic and legal precedent for continued exclusion of open homosexuals remain solid. However, should the Court establish a new ruling, public pressure will almost certainly force Congress to legislate on this matter.

Women are already flying combat aircraft and serving on warships, as mandated by Congress over the past two years. The Administration has opened a number of military jobs to women that will bring them closer than ever to ground combat. This trend should be reversed. The American people remain deeply divided on putting women in combat. Should the Administration continue its push to put some women in combat positions, public pressure will force Congress to pass legislation keeping women out of ground combat. The findings of the 1992 Presidential Commission on the Assignment of Women in the Armed Forces, which recommended keeping women out of combat, will provide guidance on how best to do this.10

Ensure that military pay keeps up with inflation.

Military pay is not keeping up with inflation. Even as inflation rose by 3 percent in 1994, military pay rose by only 2.2 percent. With inflation projected at 3 percent in 1995, the Administration proposed only a 1.6 percent pay raise, which would have effectively lowered military pay by 1.4 percent. While Congress ultimately passed a 2.6 percent increase for fiscal 1995, this will still fall short by 6.4 percent. With a 3.2 percent inflation rate projected for 1996, the Administration's planned raises range from 1.5 to 2.2 percent. Pay will only slip further as inflation increases an estimated 3.4 percent in 1997. In aggregate terms, the difference between military and civilian pay is currently estimated at approximately 12 percent and will reach 20 percent by 1998 based on current budget estimates.

According to a 1992 DOD report, 17,000 service families were receiving food stamps each month in 1992; currently as many as 56,000 actually qualify for such assistance. Military stores redeemed $27.4 million in food stamps in 1993, up $3 million from 1992. While these figures are imperfect predictors of declining living standards among military families, it is clear that they are suffering. Members should realize that the public's perception of military life as a less than rewarding career is hurting recruiting efforts for the all-volunteer force.

Treaties and the Senate

The Senate will likely have to decide in the next session of Congress whether to consent to the ratification of five treaties.11 The Senate may have to consider:

* **A protocol to the 1972 Anti-Ballistic Missile (ABM) Treaty.** The ABM Treaty, because it imposes severe restrictions on the testing and deployment of defenses against long-range (strategic) missiles, remains an unnecessary obstacle to building a strategic defense against missiles. The Clinton Administration is now negotiating with Russia and several other former Soviet states about extending existing restrictions on long-range missiles to defenses against shorter-range (theater) missiles. This would be a mistake. The ABM Treaty was never intended to impose restrictions on the testing and deployment of theater defenses. The Clinton Administration is trying to impose these restrictions not by adding a formal protocol to the ABM Treaty, which would require formal Senate consent, but by other means that would not require Senate approval. The Senate must insist that ABM amendments be subject to its consent. If necessary, the Senate should threaten to halt work on all treaties until the Administration agrees to submit ABM amendments on theater defenses and other relevant questions to the Senate for its advice and consent.

* **The Chemical Weapons Convention (CWC).** The CWC was submitted to the Senate for advice and consent by the Administration a little over a year ago. But the Senate Foreign Relations Committee was unable to act on the CWC and submit it the full Senate for consideration before the end of the session. The CWC seeks to ban the development, production, stockpiling, and use of chemical weapons. Despite claims to the contrary, the CWC is a flawed agreement. It is unverifiable and will leave the U.S. without any chemical weapons deterrent while other countries like Iran, Iraq, or North Korea may continue secretly to build such weapons. The Senate should oppose the CWC.

* **The Strategic Arms Reduction Treaty II (START II).** This nuclear arms treaty, signed in January 1993, will establish a ceiling on U.S. and Russian strategic nuclear arsenals. Each side will be able to possess no more than 3,500 deliverable nuclear

warheads. While the treaty will serve U.S. interests and should be approved for ratification, it can do so only if it is implemented properly. The Clinton Administration decided to implement the predecessor agreement, START I, even before its entry into force. The result is that the U.S. now retains about 6,000 accountable warheads under START I while Russia retains perhaps 9,000 accountable warheads. The Senate should consider attaching a condition to the ratification of START II that will prevent the U.S. from dismantling its nuclear arsenals at a faster pace than Russia.

* **The Comprehensive Test Ban (CTB) Treaty.** The CTB is being negotiated at the United Nations Conference on Disarmament and may be concluded in time for Senate consideration during the upcoming Congress. The CTB would bar the testing of nuclear weapons by all participating states. A test ban such as this would spell the end of America's nuclear arsenal. Without tests, the U.S. could not measure the reliability of its nuclear weapons. The CTB also would stop the modernization of U.S. nuclear weapons. Unable to test, Pentagon planners could design no new weapons. The net result would be the eventual denuclearization of the American armed forces. The Bush Administration argued in 1990 "that a comprehensive test ban must be viewed in the context of a time when we do not need to depend on nuclear deterrence to ensure international security and stability...." Given a world where the likelihood of the proliferation of nuclear weapons is increasing, that time has not arrived. At least fifteen countries other than the five acknowledged nuclear powers now possess or are working to possess nuclear weapons. So long as this trend continues, a comprehensive test ban will only weaken America's ability to deter a nuclear attack on its citizens.

* **The Law of the Sea Treaty.** In signing the U.N. Law of the Sea Treaty on July 29, 1994, the Clinton Administration once again placed the interests of the United Nations ahead of the United States. While the Administration claims to have resolved many of the treaty's onerous provisions which caused President Reagan to reject it in 1982, many of these drawbacks are still part of the treaty. For example, the treaty establishes a huge and cumbersome international bureaucracy to govern nearly all aspects of the world's oceans. It also requires U.S. mining companies to share technology and revenues with Third World mining interests. Moreover, it does not allow transferring wealth from industrialized nations to the Third World. The treaty will establish an international bureaucracy that will have the power to tax and levy exorbitant fees on U.S. mining firms. This treaty is downright harmful to American business and economic interests.

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3. U.S. Senate Committee on Armed Services, press release, "National Defense Authorization Act for Fiscal Year 1995," August 11, 1994, p. 2.
4. The Fiscal 1995 Defense Appropriations Bill contains lower defense spending levels than the budget resolution and the authorization bill because it does not include money for military construction and some Department of Energy defense programs. These programs are funded through other appropriations measures.
5. Baker Spring, "Clinton's Defense Budget Falls Far Short," Heritage Foundation *Backgrounder Update* No. 217, March 15, 1994.
6. Office of the Comptroller, U.S. Department of Defense, *National Defense Budget Estimates for FY 1995*, 1994, p.85.
7. John Luddy, "What 'Restoring Democracy' in Haiti Is Costing the U.S. Military," Heritage Foundation *F.Y.I.* No. 43, October 21, 1994.
8. John Luddy, "This is Defense? Non-Defense Spending in the Defense Budget," Heritage Foundation *F.Y.I.* No. 14, March 30, 1994.
9. Congressional Research Service, memorandum, "Items in FY 1994 defense legislation that may not be directly related to traditional military capabilities," October 31, 1994.
10. Presidential Commission on the Assignment of Women in the Armed Forces, *Report to the President*, November 15, 1992.
11. Article II of the Constitution gives the Senate the exclusive authority to advise and consent to the ratification of treaties.

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Foreign Aid

The Clinton Administration probably will reintroduce the PPDA in 1995. It will be important to develop alternative legislation that bases U.S. foreign aid on market reforms in target countries. Promoting free market-generated economic growth means bolstering programs aimed at strengthening market economies and aiding only countries moving in the free market direction.

There are three major categories of foreign aid: economic development aid, Economic Support Funds (ESF), and military aid. ESF and military aid are intended to bolster allies. Israel and Egypt are the primary recipients. In 1994, these two countries received a combined $5.1 billion of this aid. Military and ESF spending has been on the decline since the end of the Cold War, but there will be a continued need to maintain these funds to aid allies in a still-turbulent world.

Development aid is very different. Its purpose is to promote the economic development of recipient countries. In this purpose it has failed. Many of the countries receiving large amounts of development aid from the U.S. and other countries today – such as Tanzania and India, for example -- suffer in economic despair. Meanwhile, most of the countries that have embraced free markets, such as Hong Kong and Singapore, have sustained huge levels of economic growth without foreign aid. Experience shows that development aid is anything but necessary for economic development. Instead, it can lead to dependence and the postponement of reforms. In this way, foreign aid can perpetuate the very poverty it pretends to eliminate.

Indeed, foreign aid can be counterproductive. The U.S. development aid program, which burgeoned in 1960s, all to often has been a subsidy for socialist countries throughout the world. To avoid its corrupting potential, it is essential that development aid can be given only to help those countries moving toward adopting a free market system. The free market is the only proven method of promoting economic growth and development.

The Clinton PPDA does not do this. Instead, the Clinton Administration's foreign aid reform program promises to accomplish a myriad of objectives, including curbing population growth, preserving the environment, strengthening democracy, raising the status of women, and strengthening indigenous organizations. Conservatives as well as liberals would like to see a world in which these objectives are advanced.

At issue, however, is whether the U.S. government with its limited resources can accomplish these tasks overseas. The questions are these: Will the U.S. and other donors continue spending billions for the foreseeable future in an attempt to "provide" these desired outcomes? Or will they instead use aid to encourage recipient countries to develop the free market means by which these goals, including environmental protection, are best reached? The discredited path favored by the Clinton Administration will lead to perpetual transfers of wealth, accompanied by dependency, an increasing contempt, and even a sense of entitlement felt by development aid recipients. Conservatives rightly see development aid as transitional.

Foreign aid needs to be overhauled. To do this the Congress should:

Establish the Index of Economic Freedom as the benchmark for giving foreign aid.

The Index of Economic Freedom, developed by The Heritage Foundation, measures the relative economic freedom in 101 countries of the world, including those receiving foreign aid from the U.S. There is a stark contrast between the tremendous development progress made by those countries that have pursued free market-oriented development strategies and the economic stagnation of those that have chosen the path of socialism. Yet the U.S. development aid program has not sharply recognized this distinction in allocating aid. All too often it has contributed to economic stagnation by aiding countries with no intention of helping themselves. It is for this reason that Republicans serving on the House Foreign Aid Appropriations Subcommittee have urged AID to adopt The Heritage Foundation's Index of Economic Freedom as the standard against which it evaluates allocations of development aid among countries.2

The Index of Economic Freedom takes into account numerous factors of economic freedom, including, for example, a country's trade, tax, and monetary policies and its protection of property rights. It provides an excellent means by which to judge which potential development aid recipients are making free market reforms and which are not. The Index would also serve an essential purpose by highlighting free market-generated economic growth, thereby providing the development aid program with the sharp focus that almost everyone recognizes it desperately needs.3

Reject the notion of "sustainable development."

AID Administrator Brian Atwood has called sustainable development the philosophical basis of the Clinton Administration's entire foreign aid reform effort. Yet it is hard to see how this all-encompassing mission statement contributes to a clearer focus for AID. Moreover, sustainable development is a fashionable catchphrase of the left, which supports the idea of a country's "right" to development. This right, it turns out, is to be satisfied through the developed world's largesse. This includes expanded official transfers of wealth to the developing world for a variety of purposes, including the protection of the environment. Such aid would have very little to do with encouraging free markets; in fact, many high-profile advocates of sustainable development are actively hostile to free markets, envisioning instead an environmentally inspired socialism which promises nothing but economic stagnation and environmental devastation.

continued on next page

2. *Foreign Operations, Export Financing, and Related Appropriations Bill, 1995*, Report 103-524, p. 121.

3. The Heritage Foundation will release the first edition of *The Index of Economic Freedom* in late 1994.

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Trade

Building on the successful enactment of the GATT legislation, conservatives should seek to extend free trade while fighting pressure for protectionism. In particular, conservatives should urge Congress to:

Renew "fast track" authority.

Legislation is needed to reauthorize "fast track" negotiating authority for the U.S. Trade Representative. When Congress adopts a "fast track" law, it lays down the negotiating objectives for the U.S. Trade Representative and agrees that any agreement meeting those objectives will be considered in Congress according to special, restricted procedures that require an "up-or-down" vote with few or no amendments. U.S. trade negotiators have found the fast track procedures essential to the conduct of commercial diplomacy in recent years.

Extend other trade agreements.

The Generalized System of Preferences, through which many less developed nations are permitted to export to the United States with tariff concessions, needs to be extended. In addition, the Caribbean Basin Initiative, on which the small countries of that region rely for favorable trade relations with the United States, needs to be modified to avoid conflicts with provisions in NAFTA.

Oppose attempts to "legislate away" trade imbalances.

There is likely to be an attempt by some in Congress to use U.S. trade law to mandate a reduction in the U.S.-Japan trade deficit. The trade deficit with Japan for 1994 will likely linger between $75 billion and $100 billion. This, coupled with what some in Congress see as a failed White House policy on Japanese trade, will increase pressure on many lawmakers to "legislate away" the U.S.-Japan trade deficit.

In 1994, Representative Richard Gephardt (D-MO) went as far as drafting a bill that would mandate specified reductions in the trade deficit with Japan. The proposed law would automatically impose punitive trade restrictions on Japanese imports if these targets are not met, thus penalizing American consumers and businesses that buy Japanese goods. Gephardt held off introducing the bill in 1994, however, apparently choosing to wait for a more opportune time after the 1994 U.S.-Japan trade deficit numbers are released in early 1995.

If America is to remain competitive, conservatives in Congress must strongly oppose legislation that would mandate sales or purchases from Japan or anywhere else. If such a measure were to pass, it would merely result in increased trade protectionism on both sides of the Pacific, hurting American workers as much as those in Japan. Japan buys over $50 billion in U.S. merchandise each year and over $15 billion in services. Sales of goods and services to Japan alone account for over one million U.S. jobs. If the United States imposes any type of trade restriction on Japanese imports, triggering retaliation from Japan, the result will be lost American jobs -- and possibly an increase in the trade deficit as

American exports to Japan are reduced by new Japanese quotas and tariffs.

Instruct the executive branch to negotiate additional trade agreements with Latin America and Asia.

A far better way of dealing with U.S.-Japan issues would be to negotiate a free trade agreement. Such negotiations, like the North American Free Trade Agreement (NAFTA), would allow both governments to stand aside politically and allow the private sector in each country to negotiate mutually profitable business arrangements. A bill calling for such an arrangement should be a top priority for lawmakers committed to fair and open trade between the U.S. and its most important trading partner in the Pacific.

New fast track negotiating authority also should be used to expand the NAFTA agreement to include additional Latin American governments. Chile is one Latin American country that could quickly qualify to join NAFTA, but there is also interest in expanding NAFTA to include other Latin American countries. U.S. exports to Latin America, mostly of manufactured goods, more than doubled between 1985 and 1993, from $30 billion to $79 billion. The ultimate goal should be the creation of a Western Hemisphere Free Trade Area within a period of 10 to 15 years. First on the list should be a free trade agreement with Chile. Expanded U.S. trade with the rest of the Western Hemisphere will create more American jobs, lower consumer prices, increase U.S. investment abroad and help to democratize Latin America and the Caribbean. Moreover, as Latin America's economies grow and democracy's foundations are fortified, Latin American governments can be expected to make progress toward solving some of their pressing social problems, including some which impact directly on U.S. national security interests, such as narcotics trafficking, illegal immigration to the United States and left-wing subversion in Latin America. Congress should understand that stronger U.S. trade relations with Latin America and the Caribbean are good, above all, for the United States.

Strip all environmental and labor provisions from trade legislation.

Environmentalists and organized labor have advanced the dubious argument that the worldwide move to capitalism and expanded trade requires governments to adopt regulations and mandates to protect the environment from economic growth. Such mandates currently impose burdens and raise costs for producers in the United States and Europe. While there are many good reasons why foreign governments might want to adopt higher standards for environmental and social regulation, these concerns are not the proper focus for U.S. foreign commercial diplomacy or trade policy. U.S. trade sanctions to force foreign governments to impose U.S.-approved environmental or labor requirements are totally inappropriate in principle. Moreover, there are practical domestic reasons to oppose such sanctions. First, sanctions always hurt some Americans as well as foreigners, even when retaliation is not triggered. Second, there are always direct beneficiaries of trade sanctions in the United States, such as producers of import-competing goods, who would be encouraged to raise spurious issues in order to provoke wider use of sanctions for market protection and profit.

The debate in Congress over U.S. trade policy and how aggressive the government should be is usually driven by industries facing stiff competition from foreign producers, whether in the U.S. domestic market or in foreign markets. American companies that are enjoying rapid export growth or that need to import component parts and intermediate products do not spend as much lobbying Congress. The duty of a government ought to be to treat all citizens with equal justice, not to bestow protection and favors on those with the most active lobbyists. One side of the trade policy debate is loud and clear while the other side is mute -- too busy promoting jobs and economic growth. The appeal for trade sanctions and restrictions unfortunately harms America's competitiveness by imposing unnecessary additional costs on the more efficient sectors of industry for the benefit of the relatively declining sectors. A free market works best without government "help," both in domestic and in international economic policy.

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Education

The dramatic shift in power both in Congress and in the states gives conservatives an unprecedented opportunity to undo many of the harmful education programs of the last 30 years. To the extent that government should be involved in education, it is a matter for local and state government, not for the federal government. Thus, conservatives in the new Congress should work to:

Reassign or terminate the functions of the U.S. Department of Education in order to close the Department.

Many of the Department's programs duplicate the activities of other federal agencies. Many others can and should be carried out at the state or local level. Congress should review these programs and determine which ones, with the funds to carry them out, should be transferred to the states. The goal should be to close down the department within five years.

Repeal most provisions of the Goals 2000: Educate America Act.

Congress should reconsider the Goals 2000 legislation and turn the 1,000-page bill into a ten-page measure that will simply grant money to the states for education reform efforts. Congress should then reduce this funding over time as state reform experiments are completed. In revising the statute, Congress should:

1. **Repeal** all of the regulations and mandates including, but not limited to, the opportunity-to-learn standards and the 7th and 8th goals that were not agreed to by the governors. These latter goals regulate "inputs." The others deal with performance measures, or "outputs."
2. **Eliminate** the National Education Standards and Improvement Council (NESIC), the National Goals Panel, and the National Skills Board.
3. **Restore** the independence of the National Assessment of Educational Progress (NAEP).
4. **Eliminate** the bureaucratic state application process in the Act, replacing it with a simple requirement that the states send in a letter saying how they spent the Goals 2000 money within the terms of the Act.

Repeal major provisions of the Elementary and Secondary Education Act (ESEA).

The $12.7 billion reauthorization of the ESEA should be pared down and all the jargon and its mandates removed. Specifically, Congress should:

1. **Remove** the requirement that states send plans to the federal government on standards, curricula, and other inputs, as well as on social services.
2. **Repeal** all social service programs. Schools should go back to teaching and educating students instead of serving as social service agencies.
3. **Remove** all gender equity language.
4. **Guarantee** the independence of the National Assessment Governing Board, and thereby of the NAEP.
5. **Strip out** the pork-barrel spending in the legislation (including the new funds for colleges of education).
6. **Alter** the formula for granting Chapter I money. Funds should go to poor students, as originally intended, not to students in the districts of powerful Members of Congress.
7. **Add** an effective federal charter schools program that maintains state and local flexibility and encourages state charter school reforms.

When Congress revises the statute, however, it should preserve state and local authority over standards for curriculum content and student performance and state and local authority over student assessment, including how testing results are used by the states and localities. Congress also should protect state and local authority over the resources that states and communities spend on education and over school and classroom practices.

Repeal the Individuals With Disabilities Education Act (IDEA).

IDEA is extremely expensive and redundant in light of the Americans with Disabilities Act (ADA). It creates legal nightmares and provides few educational benefits. IDEA is a huge federal mandate which is costing the states billions of dollars. Congress originally intended to pay 40 percent of IDEA costs but now pays only 8 percent. Yet officials still have every incentive to declare as many children "disabled" as possible in their area so that they can collect additional funding.

Oppose the Clinton Administration's vocational educational and job training legislation.

Lawmakers should seek to replace this legislation with a system which gives students and their parents the choice of whether they want their children in a school with a vocational education element. Congress should leave these programs up to the states.

Eliminate, or at the very least means-test, the National Service Trust (NST).

The national service program does not encourage volunteerism and genuine service, but instead has distorted its very meaning. While the goals of the NST are laudable, the NST has not led and will not lead to expanded educational opportunity and increased responsibility. It has turned into another expensive, bureaucratic government spending program.

Eliminate the new direct education lending program.

The major flaw in the design of the program is that the taxpayer bears all of the risk. Schools and students should bear greater responsibilities. Congress could accomplish this by requiring schools with unacceptably high default rates to place a percentage of the government's funds into a school-financed loan loss reserve fund. Under this revision, each school receiving federal money would place into the fund an amount equal to a set percentage of the principal of each Part B loan made to students at that school as a condition for participation in Part B programs. The initial contribution percentage for a particular school would be based on that school's most recent cohort default rate, as calculated by the Department of Education, plus a margin of safety. Placing market pressures into the student loan process would have numerous salutary effects. It would create a significant financial incentive for schools to recruit with more care and discretion with an eye toward the potential student's ability to succeed at the school's particular course of study or skill area. In addition, schools would have a strong incentive to keep students in school until they are trained adequately and placed in productive jobs that will allow them to repay the loan. Finally, taxpayers would save a significant portion of the funds which now pay for default claims.

Enact a "Parent and Student Empowerment Act."

This legislation was introduced by Representative Richard Armey (R-TX) in 1993 as an alternative to Goals 2000. It could be enacted as a separate bill or incorporated into revisions made in the Goals 2000 statute. Among other things, this legislation would provide federal matching grants to the states to develop reforms such as school choice, merit and model schools, and other innovative ideas being implemented at the state level. In addition, it would free school districts to innovate by permitting waivers of federal red tape, subject to the Secretary of Education's approval. It would also enhance parents' right to protect their children from intrusive psychological testing and sex surveys and recognize the right of parent to determine which can view their children's school record.5

For Members of Congress, the choice is clear: they can continue to create new government bureaucracies to regulate state and local school districts, or they can help "empower" parents by giving them decision-making power on the front lines of real school reform. The new Congress could offer parents, teachers, and students unique opportunities to encourage reform, shrink the bloated bureaucracy, and get official Washington out of the way of innovative activists at the grass roots.

5. For a brief analysis of the Armey proposal, see Allyson M. Tucker, "Goals, 2000: Stifling Grass Roots Education Reform," Heritage Foundation *Issue Bulletin* No. 182, July 14, 1993.

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Crime

Although the crime bill conference report passed comfortably in the House (235-195) and Senate (61-38), the level of disagreement and the closeness of votes on certain sections of the bill give conservatives an opportunity to revisit a number of key issues in 1995. These include the level of social spending and the ineffectiveness of such spending in reducing crime, the distribution of federal money for police, and the amount of prison money that is used to provide space for extra prisoners. Given loopholes in the bill, conservatives should make sure that most of the prison money is used to build needed extra prisons rather than funneled into other prison-substitute programs. Conservatives should also closely monitor any effort by the Clinton Administration to increase federal regulation of state and local police, courts, or prisons. The expansion of regulation by Washington will do to the nation's criminal justice system what it has already done to the nation's social services.

In the new Congress, the debate on crime will center around two very different issues: the containment of crime and the long-term prevention of crime. In the first, the government has a clear role and competence in the arrest, prosecution, and incarceration of criminals. In the second -- addressing the "root causes" of crime -- its competence is extremely limited, and its role is less clear.

Containment

With the continuing increase in violent teenage crime,3 American taxpayers are likely to demand even more government action. Liberals are likely to respond by pushing for the next logical step in gun control: control of handguns. But conservatives can seize the opportunity to restore full state and local government authority in the identification, apprehension, conviction, and incarceration of criminals, particularly violent criminals, as the better way to protect citizens.4

A detailed roadmap for comprehensive state-based reform is already available. Former U.S. Attorney General William P. Barr has outlined 24 specific improvements that state officials can make in America's criminal justice system, including measures to protect our communities; to create a more efficient system of trials, appeals, and post-appeal procedures; and to assure the rights of victims of violent crimes.5 Moreover, state and local officials can take a variety of steps to improve the quality of the recruitment and training of police officers, improving their equipment, taking advantage of the latest technology, and directly upgrading their capacity to apprehend criminals. As William J. Bennett observes, there is "no personnel decision more important than the hiring of a cop"; in this job, "individual merit is paramount."6 If our police, courts, and prisons do a proper job, the American people will be much safer. Perhaps the most significant and far-reaching reform at the state level would be the enactment of truth-in-sentencing legislation requiring violent criminals to serve at least 85 percent of their prison sentences.7

To help state and local officials put convicted criminals behind bars, conservatives in Congress should press for new crime legislation that places on the statue books the tough anti-crime measures that liberals blocked during the debate on the 1994 crime bill. Moreover, the should reopen that legislation and repeal provisions that are costly irrelevancies or that would actually make it more difficult to contain crime. Specifically, Congress should:

Reform *habeas corpus.*

Unlimited appeals by convicted criminals now clog the courts and enable many to stave off punishment indefinitely. Such appeals should be limited severely.

Reform the exclusionary rule and review *Miranda* rights.

To help state and local police acting in "good faith," conservatives in Congress should pursue reform of the exclusionary rule by which incriminating evidence in the police investigation of a crime is rendered inadmissible in court because of technical violations of procedure, even when minor and unintentional. Congressional hearings also should be held to review the Supreme Court's *Miranda* rules to make sure that these restrictions do not unreasonably limit the ability of police officers to question criminal suspects.

Reduce federal intrusion into state crime-fighting activities.

While the federal government can assist the states in combating violent crime, the increased level of federal intrusion into state and local justice should be reversed. To this end, Congress should review all current federal laws dealing with crime, determine which impinge upon the legitimate authority of states and localities, and repeal them. There is enough to occupy the time and talents of federal law enforcement officers in combating illegal drug trafficking, organized crime, white collar crime, and political corruption without diverting their increasingly strained human and financial resources to cope with matters best handled by state and local law enforcement officials.

A 1994 bill introduced by Representative F. James Sensenbrenner (R-WI) would rebate 2 percent of the federal personal income tax taken from the residents of each state back to the state to fight crime. These rebates would amount to $55 billion over a five-year period, a stream of funding more reliable than that provided in the 1994 crime legislation. They would be free of intrusive federal regulations associated with categorized grants. They would also permit states to use the money to the best advantage in funding police officers, prisons, and courts. Moreover, the Sensenbrenner proposal gives the states the option of giving this money back directly to their taxpayers.

Make the death penalty a more certain punishment.

Heated controversy over the death penalty is unlikely to subside. President Clinton may sign an executive order, as he has promised members of the Congressional Black Caucus, that in practice introduces "racial quotas" into the administration of the death penalty. Under the withdrawn provision of the 1994 federal crime bill, congressional liberals proposed that a person convicted of a capital crime would be able to invoke statistical evidence that his execution would reinforce a pattern of racial discrimination. In its original formulation, this remarkable provision put the burden on the state to prove it was not discriminating on racial grounds in its imposition of the death penalty. If the President reopens this issue through an executive order, Congress should respond by revising federal death penalty procedures to ensure that the federal death penalty remains enforceable and by reforming the federal *habeas corpus* statute to end protracted death row appeals by state prisoners.

Repeal all federal social spending in the 1994 crime legislation.

The social spending in the crime legislation should be repealed and the money given back to the states in block grants to fight crime as they see fit.

In addition to amending the 1994 crime legislation, conservatives should closely monitor the administration of all other provisions of the bill, including the number of jurisdictions that have applied for police grants and the effect of any increased federal regulation on their ability to select and hire the most qualified police. Conservatives also should monitor the distribution of police and prison grants, track the application of all federal regulatory requirements in the 1994 crime bill, and be prepared to block them if they impede the efficiency of police or other state and local law enforcement officials. If any grants are not having the promised effects, the public should be made aware of their poor performance. Congress should also require Clinton administration officials to account for existing social spending in this area and to give Congress solid evidence of its effectiveness in preventing crime.

Taking tough action to deal with crime requires more than legislation and police to enforce it; it also requires judges who will follow the intent of the law and the Constitution. Thus, while Congress should review all current federal criminal justice policies and programs, the Senate also should ensure that all judicial candidates are sensitive to the victims of crime. In evaluating prospective federal judges, the Senate Judiciary Committee should:

Dispense with the advice of the American Bar Association, or at least balance it with recommendations from law enforcement organizations.

The American Bar Association has become highly politicized in recent years, and a growing liberal bias has compromised its integrity as an independent institution reviewing the professional qualifications and fitness of candidates for judicial office. If members of the Senate Judiciary Committee still feel compelled to consider the recommendations of the American Bar Association, at the very least they should give equal consideration to the views of professional associations representing law enforcement. On the question of fitness for high judicial office, the Senate Judiciary Committee could impanel constitutional experts selected by law enforcement associations, such as the Fraternal Order of Police or the National Sheriff's Association, to make a professional assessment of nominees in terms of their sensitivity to public safety. Meanwhile, the House and Senate Judiciary Committees should review the advocacy of the Department of Justice before the Supreme Court to determine whether the Administration is adequately supporting state and local law enforcement officials in criminal cases.

Long-term Prevention

The Department of Justice's juvenile justice programs will come up for reauthorization in the next Congress. So too will the Family Violence Prevention Act and the Child Abuse Prevention and Treatment Act. These bills are said to deal with the deeper moral and family problems connected with serious crime. Given the growing popular concern about school violence, liberals in Congress likely will push in 1995 for increased federal involvement and new therapeutic government programs and services, to be delivered through such institutions as the public schools.

In addition, Representative Charles E. Schumer (D-NY), formerly chairman of the House Judiciary Subcommittee on Crime and Criminal Justice, expressed an interest in tougher treatment of violent juvenile offenders. If past performance is any guide, however, liberals in Congress will call for increased federal mandates on the states and stronger federal regulation of existing social service programs, an approach which has been notoriously unsuccessful in the social services and welfare areas.

These "prevention" initiatives should be considered within the context of the larger debates on the second major crime issue: the root causes and long-term prevention of crime. In this area there are two distinct strategies. Liberals generally favor an expansion of government-mandated social services and programs. Conservatives believe the prevention of crime depends on raising good citizens of sound moral character.8 This is accomplished only through the love and support found primarily within intact families and through the moral guidance of churches and schools which teach the clear distinction between right and wrong, good and evil.

This task is largely beyond the competence of government agencies. Thus, two very different strategies emerge in the long-range prevention of crime, presenting a clear choice between the social engineering of the liberal welfare state and the traditional work of family, church, and school in forming children of sound character and morals. Liberals will likely call for an expansion of government programs such as "self-esteem" classes, for condom distribution, and for the expansion of various school services to usurp the care of children that parents have traditionally provided. Conservatives should respond by pressing strongly for innovative cooperation among the three nurturing institutions of family, church, and school. These social institutions, in cooperation with each other, should be the centerpiece in forming the character of children and rebuilding the strength and cohesion of local communities and neighborhoods.

To strengthen these crime-preventing institutions, conservatives should urge Congress to:

Enact tax relief to strengthen the finances of families.

The government can strengthen marriage and family life to some degree through changes in the tax code which favor marriage and the rearing of children. Current tax policy is unfriendly to both. While the average American family with children in 1950 paid only 2 percent of its income to the federal government in taxes, that same family today pays 24.5 percent in taxes, including federal income and social security taxes. Measured by average after-tax per capita income, families with children now are below elderly households, single persons, and couples without children; they are the lowest income group in America.9 Pressured by the absence of precious time and by strained financial resources, parents find it increasingly hard to given their children the time and attention they so desperately need. Tax reform is needed to reduce this burden.

Enact welfare reform to discourage illegitimacy.

The true root cause of crime is the breakdown of the family and, with it, the disintegration of the normal constraints of community.10 The federal government should pursue welfare reform that encourages the formation and preservation of intact, two-parent families. Marriage is civilization's most effective crime fighter. But family breakdown fuels violent crime.

Encourage school choice to enable low-income parents to pick schools that foster values.

The government can also facilitate the moral formation of children by fostering education vouchers and other school choice programs. This makes it possible for families who wish the school to reinforce values learned at home to choose a values-based school with a clear mandate for instruction in traditional morals. Unfortunately, many children, particularly in inner-city areas, cannot escape crime-ridden schools. At the very least, parents whose children are the victims of crime at school should be able to escape by claiming a tax credit to be used at any public, private, or parochial school of their choice. In the meantime, Congress can stimulate this debate by providing for the demonstration and evaluation of vouchers available to public, private or parochial schools.

The crime issue will resurface in 1995 because Americans believe that Congress has not taken the necessary steps to control the problem. This presents Congress with the chance to reverse the ineffective and cumbersome federalization of violent street crime, to encourage serious changes in the criminal justice system, and to protect Americans more effectively from the expected future rise in violent crime. At the same time, Congress can begin to take action to combat the collapse of family and community that is feeding crime.

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3. Associated Press, "Violent Crime Increased 5.6% Last Year, Victim Study Finds," *The Washington Post*, October 31,

1994; Patrick F. Fagan, "Rising Illegitimacy: America's Social Catastrophe" Heritage Foundation *F.Y.I.* No. 19, June 29, 1994.

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4. U.S. Department of Justice, Bureau Justice Statistics, *National Crime Victimization Survey, 1993*, October 30, 1994.

5. For a detailed discussion of the Barr recommendations, see Mary Kate Carey, "How States Can Fight Violent Crime: Two Dozen Steps to a Safer America," Heritage Foundation *State Backgrounder* No. 944/S, June 7, 1993.

6. See William J. Bennett, "It's Time To Throw the Switch on the Federal Crime Bill," Heritage Foundation *Issue Bulletin* No. 196, June 28, 1994, p. 4.

7. For a discussion of the truth-in-sentencing proposal, see James Wootton, "Truth in Sentencing: Why States Should Make Violent Criminals Do Their Time," Heritage Foundation *State Backgrounder* No. 972/S, December 30, 1993. See also Pierre Thomas, "U.S. Prison Population, Continuing Rapid Growth Since 1980's, Surpasses 1 Million," *The Washington Post*, October 28, 1994.

8. James Q. Wilson, *The Moral Sense* (New York, NY: The Free Press, 1994).

9. Robert Rector, "Reducing the Crushing Tax Burden on America's Families," Heritage Foundation *Backgrounder* No. 981, March 7, 1994, pp. 1-2.

10. Robert Rector, "Combatting Family Disintegration, Crime, and Dependence: Welfare Reform and Beyond," Heritage Foundation *Backgrounder* No. 983, April 8, 1994, p. 12. See also Patrick Fagan, "The Root Causes of Crime," The Heritage Foundation (forthcoming).

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Employers Face an Extensive Network of Workplace Regulation

"The requirements are like an octopus: the regulations are extremely complex and the company needs outside expertise to remain in compliance."—An official from a large retail company describing Employment Retirement Income Security Act and COBRA

"Knowing about all the changes that occur in the laws is also difficult....No one really has the time to read comprehensively the laws and changes to them."—An official from a medium-size textile manufacturer

"Although workplace regulations are serious, time-consuming and expensive, in the scheme of things, federal workplace regulation is not the worst thing."—An official from a large hospital

Federal workplace regulation has greatly expanded over the last 60 years, generally imposing new obligations on employers in order to protect workers. The continued growth and frequency of regulation leaves today's employers facing an extensive network of workplace rules. Workplace regulation undergoes frequent change from many sources, including actions by the Congress, the relevant agencies and review commissions, and the courts. The number of federal workplace-related requirements that affect a particular employer varies primarily by the employer's number of employees, its industry, and whether it enters into federal contracts. However, the employers we interviewed said that, in general, while workplace regulation was an important concern to their companies, nonlabor-related regulation equaled or overshadowed workplace regulation.

Federal Workplace Regulation Has Grown to Cover a Wide Variety of Workplace Activities

Relying largely on its constitutional authority to regulate interstate commerce, the Congress has passed many laws regulating the workplace of employers engaged in, or whose business activities affect interstate commerce. These laws, which change to meet the ever-expanding and increasingly complicated conditions of commerce, cover a wide variety of activities ranging from labor-management relations to pensions, family leave, and the setting of prevailing and minimum wages. (See table 2.1.)

In addition to workplace regulation imposed by the enactment of statutes or the issuance of executive orders, employers and workers face obligations and protections established by regulation and case law. Federal agencies issue regulations clarifying and expanding upon the laws, and courts make decisions interpreting the laws. Most federal workplace regulatory requirements are enforced by agencies within the Department of Labor (Labor), but the Equal Employment Opportunity Commission

(EEOC) and the National Labor Relations Board (NLRB) also enforce workplace regulations.

Table 2.1: Description of Major Statutes and Executive Orders Governing Workplace Regulation[a]

Statute	Description	Principal enforcement agency
Labor Standards		
FLSA	Establishes minimum wage, overtime pay and child labor standards	Labor - WHD[b]
Davis-Bacon Act	Provides for payment of prevailing local wages and fringe benefits to laborers and mechanics employed by contractors and subcontractors on federal contracts for construction, alteration, repair, painting or decorating of public buildings or public works	Labor - WHD
Service Contract Act	Provides for payment of prevailing local wages and fringe benefits and safety and health standards for employees of contractors and subcontractors providing services under federal contracts	Labor - WHD
Walsh-Healey Act	Provides for labor standards, including wage and hour, for employees working on federal contracts for the manufacturing or furnishing of materials, supplies, articles or equipment	Labor - WHD
CWHSSA	Establishes standards for hours, overtime compensation, and safety for employees working on federal and federally financed contracts and subcontracts	Labor - WHD
MSPA	Protects migrant and seasonal agricultural workers in their dealings with farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing	Labor - WHD
Benefits		
ERISA	Establishes uniform standards for employee pension and welfare benefit plans, including minimum participation, accrual and vesting requirements, fiduciary responsibilities, reporting and disclosure requirements	Labor - PWBA,[c] PBGC[d], IRS[e]
COBRA	Provides for continued health care coverage under group health plans for qualified separated workers for up to 18 months	Labor - PWBA Treasury - IRS
Unemployment Compensation	Authorizes funding for state unemployment compensation administrations and provides the general framework for the operation of state unemployment insurance programs	Labor - ETA[f]
FMLA	Entitles employees to take up to 12 weeks of unpaid, job-protected leave each for specified family and medical reasons such as the birth or adoption of a child or an illness in the family	Labor - WHD
Civil Rights		
Title VII	Prohibits employment or membership discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin; prohibits discrimination in employment against women affected by pregnancy, childbirth, or related medical condition	EEOC[g]
Equal Pay Act	Prohibits discrimination on the basis of sex in the payment of wages	EEOC
EO 11246	Prohibits discrimination against an employee or applicant for employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors, and requires federal contractors and subcontractors to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex, or national origin	Labor - OFCCP[h]
ADEA	Prohibits employment discrimination on the basis of age against persons 40 years and older	EEOC
ADA	Prohibits employment discrimination against individuals with disabilities; requires employer to make "reasonable accommodations" for disabilities unless doing so would cause undue hardship to the employer	EEOC

(continued)

Statute	Description	Principal enforcement agency
Rehabilitation Act (Section 503)	Prohibits federal contractors and subcontractors from discriminating in employment on the basis of disability and requires them to take affirmative action to employ, and advance in employment, individuals with disabilities	Labor - OFCCP
Anti-retaliatory provision - STAA	Prohibits the discharge or other discriminatory action against an employee for filing a complaint relating to a violation of a commercial motor vehicle safety rule or regulation or for refusing to operate a vehicle that is in violation of a federal rule, or because of a fear of serious injury due to an unsafe condition	Labor - OSHA[i]
Occupational Health and Safety		
OSHA	Requires employers to furnish each employee with work and a workplace free from recognized hazards that can cause death or serious physical harm	OSHA
MSHA	Requires mine operators to comply with health and safety standards and requirements established to protect miners	MSHA[j]
Drug Free Workplace Act	Requires recipients of federal grants and contracts to take certain steps to maintain a drug free workplace	OFCCP
Labor Relations		
NLRA	Protects certain rights of workers including the right to organize and bargain collectively through representation of their own choice	NLRB[k]
LMRDA	Requires the reporting and disclosure of certain financial and administrative practices of labor organizations and employers; establishes certain rights for members of labor organizations and imposes other requirements on labor organizations	Labor - OAW[l]
Railway Labor Act	Sets out the rights and responsibilities of management and workers in the rail and airline industries and provides for negotiation and mediation procedures to settle labor-management disputes	NMB[m]
Employment Decisions: Hiring and Separations		
Polygraph Protection Act	Prohibits the use of lie detectors for pre-employment screening or use during the course of employment	Labor - WHD
Veterans Reemployment Act	Provides reemployment rights for persons returning from active duty, reserve training, or National Guard duty	Labor - VETS[n]
IRCA (employment provisions)	Prohibits the hiring of illegal aliens and imposes certain duties on employers; protects employment rights of legal aliens; authorizes but limits the use of imported temporary agricultural workers	Labor - WHD
WARN	Requires employers to provide 60 days advance written notice of a layoff to individual affected employees, local governments, and other parties	None[o]

(Table notes on next page)

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Wage and Hour Division.

[c]Pension Welfare Benefit Administration.

[d]Pension Benefit Guaranty Corporation.

[e]Internal Revenue Service.

[f]Employment and Training Administration.

[g]Equal Employment Opportunity Commission.

[h]Office of Federal Contract Compliance Programs.

[i]Occupational Safety and Health Administration.

[j]Mine Safety and Health Administration.

[k]National Labor Relations Board.

[l]Office of the American Workplace.

[m]National Mediation Board.

[n]Veterans' Employment and Training Service.

[o]Although ETA wrote WARN's implementing regulations, there is no principal enforcement agency because the law is enforced privately through the courts.

Over the last 60 years, the Congress, largely relying on its constitutional authority to regulate interstate commerce, has enacted laws expanding the federal regulation of workplace activity to many new areas such as child labor, pensions, labor-management relations, and occupational safety and health.[12] In many of these areas federal regulation followed scattered state efforts to regulate the workplace. For example, Massachusetts passed the nation's first child labor law in 1836 and the first factory inspection law to improve occupational safety and health in 1877.

Most of the statutes and the executive order comprising the framework of federal workplace regulation were put in place during three periods: 1931 to 1940, 1963 to 1974, and 1986 to 1993. (See figure 2.1.) Those statutes that the Congress enacted before 1940 either set basic labor standards regulating minimum wages, prevailing wages, or overtime pay (for example, the Fair Labor Standards Act and the Davis-Bacon Act) or

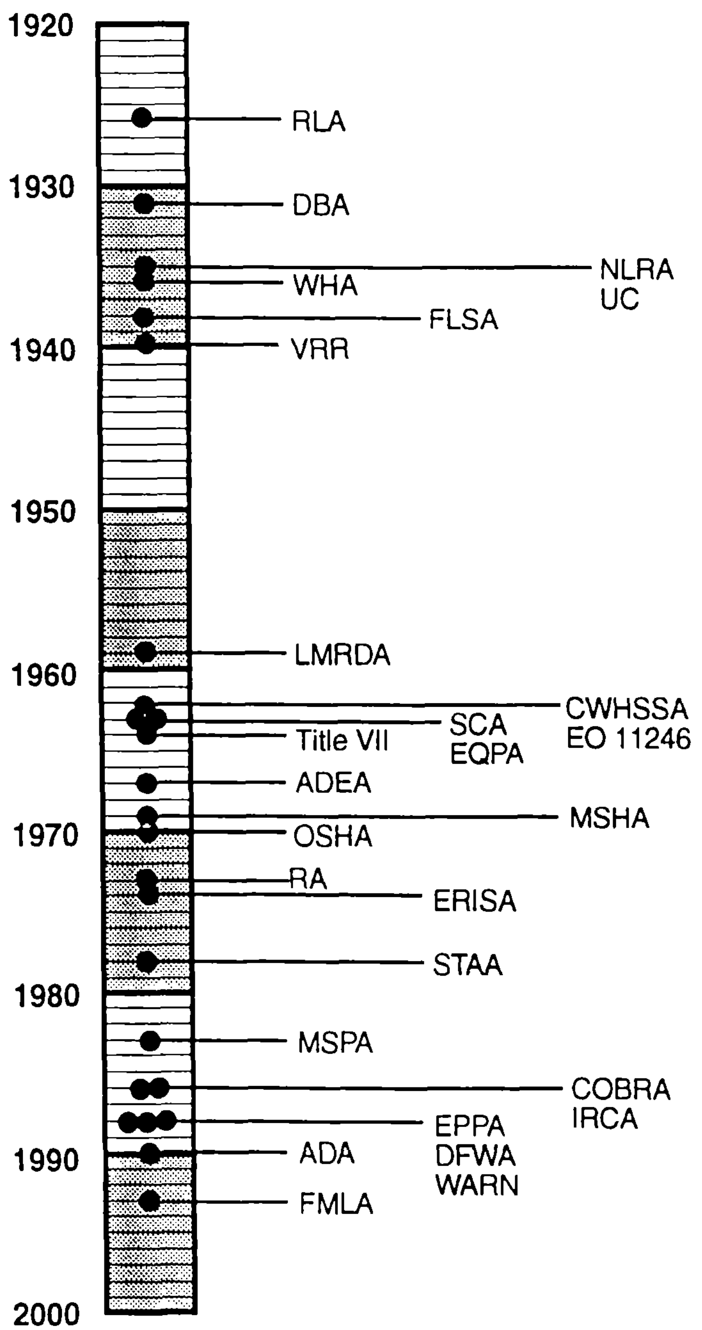
[12]The Constitution gives the Congress the authority to regulate interstate commerce. A large fraction of the workforce is engaged in interstate commerce. For example, Labor's Wage and Hour Division, which, among other laws enforces the Fair Labor Standards Act (FLSA), estimates that the FLSA covers about 113 million workers—96 percent of the workforce—through its interstate commerce provision.

established broad rules governing the conditions under which workers and employers may bargain collectively (Railway Labor Act and the National Labor Relations Act).[13] While 7 statutes had been enacted by 1940, only 8 major statutes were in place as of 1960. The Congress initiated a second wave of workplace legislation during the 1960s and early 1970s that addressed civil rights issues, and regulated new areas such as employee pensions. This activity increased the number of statutes and executive orders enacted to 16 by 1970 and 19 by 1980. Finally, during the mid-1980s the Congress passed a series of labor standard statutes that addressed generally narrower workplace issues not covered during the two earlier periods. For example, the Employee Polygraph Protection Act addresses the use of polygraphs in the workplace and the Workers' Adjustment Notification and Retraining Act (WARN) addresses the issue of employee notification of layoff in the event of a reduction in business operations.[14]

[13]The main difference between these two kinds of statutes is that the agreements reached under the latter type—labor-management statutes—are directly protective only of employees in unionized workplaces where bargaining has been successful. These agreements do not affect nonunionized workplaces or those where, for one reason or another, agreements are not achieved. On the other hand, basic labor standards mandate minimum protection of all employees, without regard to union status.

[14]These laws provide a narrower scope of protections than the Occupational Health and Safety Act which addresses more wide-ranging issues of workplace safety and health, and the National Labor Relations Act, which governs collective bargaining issues between employers and unions.

Figure 2.1: Legislative Chronology



ADEA	Age Discrimination in Employment Act
ADA	Americans With Disabilities Act
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985
CWHSSA	Contract Work Hours and Safety Standards Act
DBA	Davis-Bacon Act
DFWA	Drug-Free Workplace Act
EPPA	Employee Polygraph Protection Act
ERISA	Employee Retirement Income Security Act
EQPA	Equal Pay Act (amendments to the Fair Labor Standards Act)
EO 11246	Executive Order 11246
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
IRCA	Immigration Reform and Control Act (amendments to the Immigration and Nationality Act)
LMRDA	Labor-Management Reporting and Disclosure Act
MSHA	Federal Mine Safety and Health Act
MSPA	Migrant and Seasonal Agricultural Worker Protection Act
NLRA	National Labor Relations Act
OSHA	Occupational Safety and Health Act
RLA	Railway Labor Act
RA	Rehabilitation Act - Section 503
SCA	Service Contract Act
STAA	Surface Transportation Assistance Act (Anti-retaliatory provision)
Title VII	Title VII of the Civil Rights Act
UC	Unemployment compensation provisions of the Social Security Act
VRR	Veterans' reemployment rights provisions of the Selective Training and Service Act
WHA	Walsh-Healey Act
WARN	Workers Adjustment and Retraining Notification Act

This growth in workplace regulation occurred as federal and some state governments increased regulation in other areas such as environmental safety and consumer protection. For example, the Congress has increased regulation of pharmaceuticals, consumer products, and the environment as illustrated by the creation of the Food and Drug Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency, among others.[15]

Workplace Regulation Today: Complex and Varied

Employers and workers currently face an extensive network of workplace requirements covering a wide variety of workplace activities. The framework of federal workplace regulation provides a wide variety of rights for employees and due process protections for employers. Many sources of regulatory change, such as congressional, agency, and review commission actions, and judicial interpretation can affect employers' and workers' rights and responsibilities. Employers also face a combination of federal and state laws that further increase regulatory responsibilities. The actual number of requirements that affect a particular employer varies primarily by its size, industry, and in some cases its clients.

Employers Face Combination of Federal and State Workplace Regulation

Because federal, state, and local governments have authority to regulate various workplace activities, employers face a complicated interaction of workplace statutes and regulatory requirements. This complexity occurs because of the varied nature of the federal-state relationship within each of these areas of workplace regulation. (See figure 2.2.) The regulatory relationships fall into three general categories: federal dominance or preemption; dual control, in which the states exercise varying degrees of authority depending on the activity; and a defined federal-state "partnership." Most workplace activities are subject to some form of dual federal-state control.

[15]State and local governments have also been active in regulating employers in areas such as insurance and consumer protection.

Figure 2.2: Relationship of Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation to State Law[a]

Statute	Federal law generally preempts state law	Federal law does not preempt stricter state requirements	State-federal partnerships
Labor Standards			
FLSA		✓	
Davis-Bacon Act		✓	
Service Contract Act		✓	
Walsh-Healey Act		✓	
CWHSSA		✓	
MSPA		✓	
Benefits			
ERISA	✓		
COBRA	✓		
Unemployment Compensation			✓
FMLA		✓	
Civil Rights			
Title VII		✓	
Equal Pay Act		✓	
EO 11246		✓	
ADEA		✓	
ADA		✓	
Rehabilitation Act (Section 503)		✓	
Anti-retaliatory provison-STAA[b]			
Occupational Health and Safety			
OSHA	✓		✓
MSHA		✓	
Drug Free Workplace Act		✓	
Labor Relations			
NLRA	✓[c]		
LMRDA		✓[c]	
Railway Labor Act	✓		
Employment Decisions: Hiring and Separations			
Polygraph Protection Act		✓	
Veterans' Reemployment		✓	
IRCA	✓		
WARN		✓	
Total	6	19	2

[a]Many statutes are complex and contain a multitude of requirements, rights and remedies. The information presented has been simplified for illustrative purposes.

[b]STAA does not explicitly preempt state law and various conflicting case law on the issue.

[c]Federal law preempts state law with regard to improprieties in the election of union officers.

The Congress has constitutional authority to preempt state regulation of any aspect of workplace activity in interstate commerce. Federal preemption of state regulation may be explicitly stated in a statute or may be implied from a statute's broad and comprehensive scope of coverage. However, the mere enactment of federal legislation in a particular area does not supersede state law regulation in that area.[16] Federal law does not supersede state law unless the Congress has shown a clear intention to do so or there is an irreconcilable conflict between the federal and state law.[17] ERISA, for example, is one of the few statutes in the area of workplace regulation that explicitly provides for federal preemption. A few of the statutes we reviewed have been held by the courts to preempt state regulation because of the comprehensive nature of the statute. For example, immigration laws, which would include the Immigration Reform and Control Act (IRCA), have been held to preempt state law because the federal law provides for such a broad and comprehensive plan that state law ". . .stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[18] Similarly, the National Labor Relations Act (NLRA) has been held to preempt state regulation of activities covered by that act, except in the area of union security provisions.[19]

The Congress has allowed federal and state efforts to regulate the workplace to coexist in different forms. Some laws, such as FLSA, provide that states may enact requirements exceeding those in the federal statute. For example, some states such as California have child labor law provisions that are more stringent than those specified in the FLSA for some occupations and industries. California restricts hours of work for minors ages 16 and 17 while the federal law allows unlimited hours of work. Other laws, such as Title VII, provide for concurrent federal and state jurisdiction through coordinated enforcement. Title VII requires complaints of unlawful employment practices to first be filed at the state or local level if state or local law prohibits the alleged practice. A

[16]Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

[17]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[18]Hines v. Davidowitz, 312 U.S. 52, 67 (1940).

[19]Guss v. Utah Labor Board, 353 U.S. 1 (1957).

complaint may also be filed with the federal Equal Employment Opportunity Commission. To the extent that state and local workplace standards coincide with, or supplement federal requirements, employers may face additional amounts of regulation.

Finally, several laws provide for a more defined federal-state partnership. The Occupational Safety and Health Act allows the states to set safety and health standards where the federal government approves the state program as being at least as effective as the federal program, and provides funds of up to 50 percent of program costs as incentives for states to run the program. Safety and health standards of states that do not have approved programs are preempted by federal regulation—even if the state standards are more stringent—unless no federal standard exists for the area. The federal Unemployment Compensation program provides for federal-state coexistence in another similar way; it provides federal funds to states to run their own unemployment compensation programs that must be approved by the federal government.[20]

Employers and Unions Face Many Sources of Regulatory Change

The regulatory environment is constantly changing. A multitude of sources affect the regulatory environment: congressional action, agency issuance of new and revised regulations, new interpretations by review commissions of existing rules, and administrative and judicial decisions may also alter the regulatory responsibilities of employers and the protections afforded to workers. To keep up with new regulatory developments, employers, unions, and workers need to monitor many of these sources on a regular basis. These actions take place on federal, state. and local levels.

The Congress may change laws resulting in new workplace requirements and regulations; some laws have been amended numerous times since their enactment. For example, the Fair Labor Standards Act has been amended 25 times since its enactment in 1938 and the federal Unemployment Compensation Insurance (UI) provisions have been amended 21 times through 1987.[21] In both cases, the amendments often broadened the scope of legislative coverage, granting rights to workers and placing new responsibilities on employers who were previously

[20]States have considerable autonomy in setting eligibility amounts and other key provisions of their unemployment insurance programs. See Unemployment Insurance: Trust Fund Reserves Inadequate (GAO/HRD-88-65, Sept. 26, 1988).

[21]See Unemployment Insurance: Trust Fund Reserves Inadequate (GAO/HRD-88-65, Sept. 28, 1988), pp. 107-108. In addition, P.L. 102-318, enacted in 1992, extended emergency UI benefits to 33 weeks.

exempt from coverage. The Congress has also modified regulatory requirements by passing specific riders to appropriations bills that are reauthorized on an annual basis. For example, the Congress has annually passed restrictions on health and safety inspections of workplaces with 10 or fewer workers since the late 1970s and, more recently, restrictions on the implementation of prevailing wage laws affecting construction helpers.

Federal agencies are also a major source of regulatory change—they issue regulations that precisely define the responsibility or obligations of employers and others under the law. The Department of Labor issues regulations under a number of laws affecting the workplace. For example, Labor issues regulations under OSHA that set specific limits on employee exposure to hazardous substances, such as asbestos and lead, and set out measures that employers must take to protect employees from exposure to these hazards.

Independent review commissions, administrative tribunals, and the courts also affect regulatory requirements by issuing decisions interpreting the law. For example, administrative law judges in Labor issue decisions on how various laws, such as FLSA and CWHSSA, should be applied to findings of fact.

Because of the frequency of administrative or judicial decisions, workers' rights and employers' compliance responsibilities are often changed even when the Congress infrequently amends those statutes and few agency regulations are issued. For example, the Congress amended the NLRA significantly only three times since its initial enactment in 1935 and NLRB has rarely promulgated regulations. However, cases brought before administrative law judges may result in changes to requirements affecting employers and employees; the body of case law developed by the NLRB in 1993 alone included more than 1,200 decisions.

For any individual statute, employers and employees must keep abreast of new developments from many of these sources of regulatory change. For example, employers and employees monitoring occupational safety and health regulations must be aware of the federal regulations issued by the Occupational Safety and Health Administration or the state regulations issued by federally approved state occupational safety and health programs. In addition, they must review the regulatory implications of decisions reached by the Occupational Safety and Health Review Commission, an independent agency that adjudicates OSHA enforcement actions, and the consequences of federal court decisions regarding OSHA's regulatory authority, its regulations, enforcement procedures and other issues.

Statutory Coverage Varies Primarily by Employer Size and Industry

The coverage provisions of the major statutes comprising the framework vary by a number of different criteria, including industry, employer size, whether the employer is a federal contractor. (See figure 2.3.) For example, 8 statutes restrict their coverage only to particular industries or occupations. MSHA covers the mining industry alone while the Railway Labor Act covers airlines and rail carriers. Six statutes and 1 executive order only cover employers who have federal contracts or contracts financed with federal funds, and of these, 4 statutes also restrict coverage to employers with federal contracts in specific industries or involving the employment of particular occupations.

Of the 26 statutes and 1 executive order comprising the framework of federal workplace regulation, 16 generally cover employers regardless of their industry or whether or not they are a federal contractor. Of these 16 statutes, there is significant variation in coverage according to an employer's size. All of them cover employers with 100 or more employees and 14 statutes cover employers with 25 or more employees. However, only 9 cover employers with fewer than 15 employees, and 1 of these 9 statutes—ERISA—only covers employers with some form of pension or other welfare benefit plan. (See figure 2.4.) Employers with fewer than 15 employees account for a significant proportion of all employers in the nation. For example, in 1991, 85 percent of all work establishments employed 14 or fewer employees.[22]

The number of federal statutes or executive orders covering a particular employer may vary significantly, given the restrictions in coverage of all 26 statutes and 1 executive order. For example, a federal contractor with over 100 employees who provides tax-qualified pension and health benefits could be subject to up to 23 of the 26 statutes and 1 executive order.[23] In contrast, those employers with 14 or fewer employees who

[22]Establishments are places of work and not employers, so this figure overstates the number of employers with fewer than 15 employees.

[23]This assumes that the employer is not involved in the agriculture, mining, airlines, railway, or trucking industries, and has construction, supply or service contracts with the federal government. Such an employer would be excluded from MSHA, MSPA, the anti-retaliatory provision of STAA, and the Railway Labor Act but covered by all others.

provide no tax-qualified benefits, are not organized by a labor union, and are not federal contractors could be covered by as few as 6 statutes.[24]

[24]These would be FLSA, OSHA, the Unemployment Compensation program, the Employee Polygraph Protection Act, IRCA, and the Equal Pay Act. The NLRA would also cover the employer to the extent that employees engaged in concerted activity.

Figure 2.3: Significant Limitations in the Applicability of the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Minimum number of employees necessary for coverage	Federal contractors: Federal contract necessary for coverage	Federal contractors: Minimum contract size necessary for coverage	Limited to specific industry	Major exemptions
Labor Standards					
FLSA	1				Individuals employed in agriculture by immediate family; employees in executive, administrative, or professional capacity, or outside salesmen
Davis-Bacon Act	1	✓	$2,000	Construction	
Service Contract Act	1	✓	$2,500	Service	
Walsh-Healy Act	1	✓	$10,000	Contractors in materials, supplies or equipment	
CWHSSA	1	✓		Employers of laborers and mechanics	
MSPA	1			Commercial farms	Individuals employed by immediate family members, labor unions, nonprofit organizations, any custom combine, hay harvesting, or sheep shearing operation
Benefits					
ERISA[b]	1				
COBRA	20				
Unemployment Compensation	1				
FMLA	50				
Civil Rights					
Title VII	15				Religious corporations, associations, educational institutions, or societies with respect to the employment of individuals of a particular religion to perform work connected with the entity
Equal Pay Act	1				Religiously oriented schools or universities; Indian reservations
EO 11246	1				
ADEA	20				Employees under age 40
ADA[c]	25				
Rehabilitation Act (Section 503)	1		$10,000		
Anti-retaliatory provision-STAA	1			Trucking	Trucks carrying fewer than 10,000 pounds and fewer than 10 passengers including the driver

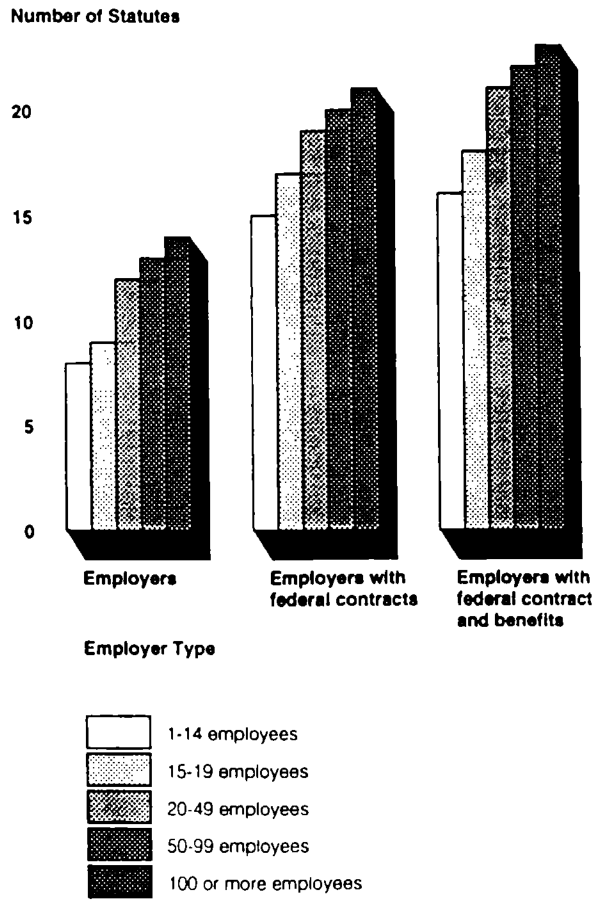
Statute	Minimum number of employees necessary for coverage	Federal contractors: Federal contract necessary for coverage	Federal contractors: Minimum contract size necessary for coverage	Limited to specific industry	Major exemptions
Occupational Health and Safety					
OSHA	1				Working conditions in industries regulated by other federal statutes, for example, mining and nuclear energy
MSHA	1			Mining	
Drug Free Workplace Act	1	✓	$25,000		
Labor Relations					
NLRA	1				Agricultural laborers, domestics, employees covered by the Railway Labor Act, management employees, confidential employees, and supervisors
LMRDA	1				
Railway Labor Act	1			Rail and air carriers	Rail operations in coal mines
Employment Decisions: Hiring and Separations					
Polygraph Protection Act	1				Experts under contract to the Departments of Defense or Energy working on atomic energy; selected employees in security and pharmaceutical industries
Veterans' Reemployment	25				
IRCA	1				
WARN	100				
Total		7	6	8	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]ERISA covers employers with any number of employees. However, the employer must have provided some form of health, pension or other welfare benefit plan to their employees.

[c]Applies to firms of 15 or more after July 26, 1994.

Figure 2.4: Coverage of Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation, by Employer Size



Note: Figure excludes four statutes that apply only to specific industries but are not federal contractors.

Some statutes cover employers of a particular size but exclude particular classes of employees working for those employers. For example, FLSA, which provides for the payment of minimum and overtime wages by every employer engaged in interstate commerce, excludes professional, administrative and executive employees from certain provisions of the act. NLRB decisions have excluded management and confidential employees from coverage of the NLRA, even when their employer is covered by the act. FMLA allows employers to exclude from coverage the highest paid 10 percent of a covered employer's staff under certain conditions.

Variations in the statutory definition of employer and employee and judicial interpretations of these decisions further complicate the coverage issue. Some statutes, like WARN, exclude part-time employees when determining the number of workers affected to satisfy the statute's provision on coverage. Temporary workers employed by the temporary employment agency and not by the client employer do not count for coverage of the client employer. In other cases, employers may classify workers as independent contractors.[25] Independent contractors are generally not counted to meet the minimum coverage limitations of most statutes and client employers do not have to withhold payroll or social security taxes from the contractor's pay.

...nctions for Violations ...d Employee Recourse ...ry Widely Among ...atutes

The major statutes of the framework of federal regulation include a variety of sanctions for violation of their provisions. The most common sanctions are civil nonmonetary remedies, such as reinstatement, hiring, promotion, injunction, or debarment; 24 of the 26 statutes and 1 executive order provided for either debarment or some other nonmonetary remedy, such as an injunction, or the reinstatement, hiring or promotion of an employee. (See figure 2.5.) Other common statutes provided for monetary sanctions. For example, 17 statutes permitted the reimbursement of unpaid wages to the affected employee.

[25]Independent contractors are self-employed workers who provide services. Employers must notify the Internal Revenue Service (IRS) when they classify an employee as an independent contractor. The IRS applies a set of criteria for determining whether a worker is an independent contractor. See glossary.

Figure 2.5: Enforcement Sanctions and Remedies Available Under the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Civil monetary penalties (maximum)	Other civil sanctions				Criminal Sanctions (maximum)
		Monetary remedies		Equitable remedies		
		Unpaid wage	Liquidated or punitive damages[b]	Debarment	Other	
Labor Standards						
FLSA	$10,000 for each child labor violation; $1,000 for each repeat or willful violation of minimum wage or overtime requirements	✓	✓		✓	6 months imprisonment for repeat; $10,000 or 6 months imprisonment for willful violations
Davis-Bacon Act		✓		✓	✓[c]	
Service Contract Act		✓		✓	✓[c]	
Walsh-Healey Act		✓	✓	✓	✓[c]	
CWHSSA	$10 for each day of violation	✓	✓	✓	✓[c]	$1,000 and/or 6 months imprisonment
MSPA	$1,000 per violation	✓			✓[d]	$1,000 and/or 1 year for willful violation; $10,000 and/or 3 years for repeat and willful violation
Benefits						
ERISA	Up to $1,000 per day for reporting requirements Up to 5% of the amount of a prohibited transaction; up to 100% if not corrected within 90 days[f]				✓[e]	$5,000 and/or imprisonment of 1 year; $100,000 for a corporation
COBRA	$100 per day for failure to comply with notice requirements				✓[e]	
Unemployment Compensation[g]						
FMLA	$100 for each willful violation of posting requirements	✓	✓		✓[h]	
Civil Rights						
Title VII	$100 for each willful violation of posting requirements	✓	✓		✓[h,i]	State or local criminal penalties may apply

Statute	Civil monetary penalties (maxmum)	Other civil sanctions: Monetary remedies: Unpaid wage	Other civil sanctions: Monetary remedies: Liquidated or punitive damages	Other civil sanctions: Equitable remedies: Debarment	Other civil sanctions: Equitable remedies: Other	Criminal Sanctions (maximum)
Equal Pay Act	$100 for each willful violation	✓	✓		✓[h]	6 months for report violations
EO 11246		✓		✓	✓[i]	
ADEA		✓	✓		✓[h]	$500 for interfering with authorized EEOC representative and/or up to 1 year imprisonment for repeat interference
ADA		✓	✓		✓[h,i]	State or local criminal penalties may apply
Rehabilitation Act (Section 503)		✓		✓	✓[i]	
Anti-retaliatory provision-STAA		✓			✓[h]	
Occupational Health and Safety						
OSHA	$5,000 to 70,000 for each willful violation; up to $70,000 for each repeat violation; up to $7,000 for serious, other-than-serious, or posting violation or for each day of failure to abate hazard				✓[i]	$500,000 for a corporation and $250,000 and/or 6 months imprisonment for an individual for a willful violation that results in death of employee; 1 year if prior conviction $200,000 for an organization and $100,000 and/or 6 months imprisonment for an individual for false statements in a required certified document
MSHA	$50,000 for each violation; $5,000 per day for failure to abate hazard; miners may be fined up to $250 for willful violation of smoking standards				✓[k]	$500,000 for an organization and $250,000 and/or 1 year imprisonment for an individual for willful violation; 5 years for repeat and willful violation $500,000 for an organization, $250,000 and/or 5 years imprisonment for making false statements in a required certified document
Drug Free Workplace Act				✓	✓[i]	

Statute	Civil monetary penalties (maximum)	Other civil sanctions: Monetary remedies: Unpaid wage	Other civil sanctions: Monetary remedies: Liquidated or punitive damages[b]	Other civil sanctions: Equitable remedies: Debarment	Other civil sanctions: Equitable remedies: Other	Criminal Sanctions (maximum)
Labor Relations						
NLRA	[k]				✓[i]	[k]
LMRDA	$10,000				✓[i]	$10,000 and/or 5 years imprisonment for violation of fiduciary provisions, $10,000 and/or 1 year imprisonment for willful violation of bonding provisions
Railway Labor Act						$20,000 and/or imprisonment of 6 months for offense and each day of willful refusal to comply
Employment Decision: Hiring and Separations						
Polygraph Protection Act	$10,000	✓			✓[h,j]	
Veterans' Reemployment		✓			✓[c,h]	
IRCA	$1,000 per violation for misrepresentation of material fact or failure to perform obligation(s); $10,000 for hiring illegal aliens				✓[d]	$3,000 and/or imprisonment of 6 months for each violation
WARN	$500 per day	✓				
Total		17	8	7	24	
	14	17		24		13

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Liquidated damages is a monetary estimate of actual damages, punitive damages is damages as a form of punishment that is above the actual loss suffered.

[c]Breach of contract provisions invoked.

[d]Suspension of revocation of special employment privilege.

[e]Elimination of tax deductibility of plan contributions.

[f]Employers may also be fined 20 percent of the amount recovered from a fiduciary violation pursuant to a settlement agreement or court order involving the Secretary.

[g]Sanctions targeted top noncomplying state UI program.

[h]Reinstatement, hiring, or promotion.

[i]Restraining order or injunction.

[j]Abatement of hazard; imminent danger situations.

[k]Miners can be ordered withdrawn from the mine until hazard is abated.

[l]There are penalties for interfering with the performance of the duties of a member of the NLRB or its agents.

More than half (14) of the 26 statutes and 1 executive order provide for the assessment of civil monetary penalties in the event of a violation. Maximum penalties range from $1,000 to $70,000. However, in many cases the average assessed penalties are far lower. For example, in 1993, the maximum penalty permitted for a serious OSHA violation was $7,000 and for a child labor law violation it was $10,000. However, the average penalty actually assessed for a serious federal OSHA violation was $750 and for a FLSA child labor violation, $909. Similarly, 13 laws provided for criminal sanctions in the event of egregious violations. However, at least in some cases, these are rarely applied. For example, FLSA criminal sanctions for child labor violations have never been successfully pursued and, since 1989, OSHA has referred fewer than 50 cases for criminal action, only a small percentage of which have been pursued by the Justice Department.

Enforcement and Due Process Provisions Include Alternative Dispute Resolution

The major statutes and the executive order comprising the framework of federal workplace regulation provide various means for employees and agencies to enforce regulatory sanctions as well as corresponding protections for employers. (See figure 2.6.) These enforcement and due process provisions vary for employees and employers and from statute to statute. About half of the statutes permit employees a private right of action—the right to sue in court on their own behalf to obtain relief outside of the enforcement agency's action. Depending on the statute, employers also have a variety of protections and recourse, including informal meetings and negotiation before any adverse action, administrative hearings, and appeals to court. In addition, some statutes and implementing regulations provide for alternative dispute resolution procedures such as informal conferences and mediation.

An employee's ability to initiate a private right of action varies by statute. (See figure 2.6.) Some statutes give employees the unqualified right to sue the employer. For example, more than half (17) of the 26 statutes and 1 executive order we reviewed give employees the right to sue in court on their own behalf to obtain relief outside of the enforcement agency's action. However, some of these statutes qualify that right—3 of these 17 laws require the employee to exhaust administrative remedies before instituting a lawsuit. Another 4 of these 14 statutes extinguish the employee's right of action if the cognizant federal agency institutes court action on their behalf.

Although they may not permit employees to sue in court to obtain relief outside of the agency's action, another 8 of the statutes in the framework give employees the right to challenge an employer's action by filing a complaint with an administrative agency. The administrative agency is empowered to conduct a hearing and issue an order ruling on the issues raised in the complaint. Under these statutes, the employee has the right to then appeal unsatisfactory decisions.

The major statutes and the executive order comprising the framework of federal workplace regulation provide different time periods within which employees may file lawsuits in court. Many statutes such as the FLSA, FMLA, and the Employee Polygraph Protection Act generally permit a private right of action to be filed within two or three years of the employer's alleged violation.[26] Under the FLSA, section 503 of the Rehabilitation Act and the ADA, employees may not sue until notified by the appropriate agency that the agency will not be filing suit on their behalf, which may be too late to fall within the period the employee is allowed to sue. A couple of statutes, such as ERISA which allows 6 years in some cases and the Veterans' Reemployment Rights law, which explicitly provides that no time limit applies, provide a longer time period to file in court.

Where a statute requires the exhaustion of administrative remedies, an employee has a much shorter time to institute court action—generally a significant amount of time already has been consumed in the administrative process. These times also vary from statute to statute. For example, under Title VII, the ADEA, and the ADA, an employee has 90 days to act after the exhaustion of administrative remedies; under OSHA 60 days; and under MSHA 30 days.

[26]Under the FLSA, section 503 of the Rehabilitation Act and the ADA, employees may not sue until notified by the appropriate agency that the agency will not be filing suit on their behalf, which may be too late to fall within the period the employee is allowed to sue.

Employers also have a variety of protections and recourse. Employers have the right to an administrative or judicial appeal, or both, under some statutes. Those statutes that authorize an agency to take action against an employer without going to court, such as the NLRA and the Davis-Bacon Act, either explicitly provide or have regulations that provide the employer with the right to have a hearing. Employers (as well as employees) generally have the right to appeal adverse agency decisions to court. The time within which such appeals are required to be instituted varies from 10 days to 60 days, depending on the statute.

Some statutes also provide for alternative dispute resolution procedures—informal means of resolving problems before pursuing traditional legal avenues. A few of the statutes we reviewed require the enforcing agency to attempt to informally settle proposed charges against an employer before proceeding with formal action. For example, Title VII, ADEA, and ADA require the Equal Employment Opportunity Commission to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Regulations under some statutes, such as OSHA and MSHA, provide an opportunity for the employer to request an informal conference to discuss a proposed citation and/or penalty. Two other statutes—the NLRA and the RLA, have provisions that encourage parties involved in labor disputes to use conciliation and mediation to resolve disputes.[27] Even when the statute or regulation does not require such negotiation, many agencies generally are anxious to negotiate settlements with employers.

[27]Title II of the NLRA established an independent agency, the Federal Mediation and Conciliation Service, to settle such disputes through conciliation and mediation.

Figure 2.6: Forms of Recourse Under the Major Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Private right of action available to employee	Private right available after exhaustion of administrative remedies	Number of days to initiate formal appeal of administrative decision
Labor Standards			
FLSA	✓[b]		15
Davis-Bacon Act	✓[c]		30
Service Contract Act			30
Walsh-Healey Act			20
CWHSSA	✓[c]		30
MSPA	✓	✓	30
Benefits			
ERISA	✓	✓[e]	30 for reporting and disclosure violations
COBRA	✓	✓	60
Unemployment Compensation			
FMLA	✓[b]		15
Civil Rights			
Title VII	✓	✓	
Equal Pay Act	✓[b]		
EO 11246			20
ADEA	✓[b]		
ADA	✓	✓	
Rehabilitation Act (Section 503)			20
Anti-retaliatory provison-STAA			30
Occupational Health and Safety			
OSHA			15
MSHA			30
Drug Free Workplace Act			
Labor Relations			
NLRA	✓[d]		
LMRDA	✓[e]		
Railway Labor Act			10
Employment Decisions: Hiring and Separations			
Polygraph Protection Act	✓		
Veterans' Reemployment	✓		
IRCA	✓		
WARN	✓		
Total	17	5	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Private right of action extinguishes if federal agency brings suit on employee's behalf.

[c]Private right of action exists only when government has withheld insufficient amounts from contractor to pay underpaid employees.

[d]Private right of action exists only to enforce the terms of a collective bargaining agreement.

[e]Private right of action is against labor organizations only.

Employers Must Comply With Many Paperwork and Recording Rules

Virtually all of the statutes and the executive order comprising the framework of federal workplace protections require employers to comply with various paperwork or recording duties. These responsibilities take many forms: requiring that forms be completed or filed with particular federal agencies, collecting particular business data such as payroll records (FLSA), filing workforce profile information (Title VII of the Civil Rights Act), or recording occupational injury data (Occupational Safety and Health Act). (See figure 2.7.) Fourteen statutes require employers either to post notices in the workplace informing employees of their rights or provide written notice or information to employees when particular events occur. For example, employers must post a notice approved by the Secretary of Labor explaining a worker's rights and responsibilities to take family and medical leave under FMLA, and must issue a revised Summary Plan Description to all plan participants whenever there is a material change in a pension plan under the Employee Retirement Income Security Act. In addition, every statute and executive order which requires records to be kept requires the retention of records for at least 1 year, but more typically for 3 years or more.

Figure 2.7: Reporting and Disclosure Requirements of Major Federal Workplace Statutes and Executive Order Comprising Framework of Federal Workplace Regulation[a]

Statute	Reporting/disclosure requirements: Forms must be completed or filed with agency	Payroll or other business data must be collected	Notices must be posted in workplace	Data on injuries and/or complaints required	Years records must be maintained
Labor Standards					
FLSA		✓	✓		2-3
Davis-Bacon Act	✓	✓	✓		3
Service Contract Act		✓	✓		3
Walsh-Healey Act		✓	✓		2-3
CWHSSA	✓	✓			3
MSPA	✓	✓	✓		3
Benefits					
ERISA	✓		✓		6
COBRA					
Unemployment Compensation	✓	✓			3
FMLA		✓	✓		2-3
Civil Rights					
Title VII	✓	✓	✓	✓	1-3
Equal Pay Act		✓	✓	✓	2-3
EO 11246	✓	✓	✓		
ADEA		✓	✓	✓	1-3
ADA		✓	✓	✓	1-3
Rehabilitation Act (Section 503)			✓	✓	1
Anti-retaliatory provison-STAA					
Occupational Health and Safety					
OSHA	✓		✓	✓	5[b]
MSHA	✓		✓	✓	1[c]
Drug Free Workplace Act	✓		✓	✓	1-5
Labor Relations					
NLRA			✓[d]		
LMRDA	✓				5
Railway Labor Act			✓		
Employment Decisions: Hiring and Separations					
Polygraph Protection Act	✓		✓		3
Veterans' Reemployment					
IRCA	✓	✓	✓		3
WARN			✓[e]		
Total	13	14	21	8	

[a]Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

[b]Records of employee exposures must be retained for 30 years because of long latency periods associated with chronic illnesses.

[c]Records of mine accidents, injuries, and illnesses must be retained for 5 years.

[d]Posting required in certain remedies.

[e]Although WARN has no requirements for posting information, it requires the notification of all affected employees and other selected parties of a reduction in operations.

Small Employers Reported More Contracting Out as Part of Compliance Strategy

Employers we talked to typically had different compliance strategies depending on their size, with smaller employers more likely to contract out key workplace requirements than larger employers. Small employers we interviewed more generally relied on outside legal staff; contracted out their health, pension, and other benefits administration; and often relied on contractors for payroll processing. Some employers of all sizes relied on unions to administer their health and pension plans as part of their collective bargaining agreement. In contrast, large employers reported that they generally maintained in-house human resource departments, health and safety units, and legal staff to comply with many workplace requirements.[28] The larger companies were also more likely to administer their own health and welfare plans. However, some ERISA pension benefit requirements were considered to be so complex that even many larger companies said they contracted out for compliance duties, such as the filing of Form 5500.

Partly because of the complexity of the requirements, some large employers we talked to who were federal contractors relied on outside expertise to administer their affirmative action plans, including their annual affirmative action reports, for compliance with the Office of Federal Contract Compliance Programs.

[28]Although many maintained their own legal staff, some larger employers also reported selectively using outside legal staff for certain types of litigation.

Workplace Regulation Important but Not Sole Regulatory Concern for Many Employers We Interviewed

Employers that we interviewed said that federal workplace regulation was an important business concern but often not the most important regulatory issue they faced. Small employers often reported primary concern with nonfederal or nonworkplace regulations,[29] while larger employers were more likely to focus on federal workplace regulation.[30] Most of the employers we spoke to said that nonworkplace or industry-specific regulations were cited as at least as important or more important than workplace regulations. This was true regardless of employer size, although workplace issues were generally less of a concern for smaller employers. Employers of all sizes and union representatives we talked to believed that federal workplace regulations were significant but other types of regulations equaled or overshadowed their importance. A small diner owner said that state health and county liquor regulations are predominant concerns:

"Without a liquor license and a clean bill of health, I'd be out of business."

Several employers were more concerned about the difficulties of complying with environmental or tax regulations than with workplace regulations. For example, a small homebuilder explained how state and county environmental laws cause "the biggest headaches" for him:

"Worksites have had almost daily inspections of erosion control and solid waste... Subcontractors and utility companies often create erosion problems at sites...then we're held responsible...Hazardous chemical regulations are so strict and detailed that even haulers must have state permits. This makes it very difficult and expensive to get rid of waste. The Clean Air Act causes confusion because of conflicting signals. We used to burn trash but now we don't know what to do with it."

And a medium-size insurance company told us:

"Workplace regulations are a fact of life that we can easily live with. They are doable and pose very few problems. Insurance industry regulations and tax requirements are much more complicated and take more time to administer than workplace regulations. One employee's time is devoted solely to calculating the amount of insurance funds that can be built up on a policy; any miscalculation results in hefty IRS fines."

[29]The exemption of smaller employers from many federal workplace statutes—COBRA, WARN, FMLA, and many civil rights laws—may contribute to this perspective. See figure 2.4 for the statutory coverage of the framework of federal workplace regulation.

[30]Some large employers we spoke with pointed out that because we interviewed human resource personnel, they placed great significance on workplace-related issues. They said that their tax or legal departments might have provided a different view.

Unions made similar comments about employers where they represented workers. For example, an official from an international union said:

"In most of our industries, employers would quickly give in on all of the workplace regulation, and in other areas too, if they could get out of a lot of the environmental rules they consider overly restrictive...they'd give their right arm for this."

Large employers in labor intensive industries like hotels, retail trade, and temporary employment said that they were more likely to identify federal workplace regulation as the most significant set of regulations affecting their operations. With more employees and high turnover, these employers must process and maintain more paperwork on their staff and train more management employees. Officials at a large retail company, for example, described how:

"The cost of administering workplace regulations is very great when you have a large number of stores and are spread out over many states. It is a truly monumental task for labor-intensive firms like ours which also have high turnover, you are always training management and employees to do new things or bringing others up to speed on items which haven't changed."

High staff levels can make compliance with workplace regulations more of a task. As officials from a large hotel employer described it:

"We must deal with many employees and all the individual behavior that comes with that. As a result, compliance is time-consuming and expensive."